PROPERTY
BANKRUPTCY

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This volume contains *two* parts, each one of which is arranged as a separate book, complete in itself, with independent title pages, tables of contents, and indices, and with separate paging.

The parts so treated are as follows:

1. Property; and immediately following,
2. Bankruptcy (with two added chapters on Debtor and Creditor generally).

At the end of each subject see Questions and Problems. At the end of Property see a number of Forms; at the end of Bankruptcy see Text of the National Bankruptcy Act.

AMERICAN COMMERCIAL LAW SERIES

Second Edition

The Law of Property

INCLUDING

Estates and Wills

WITH

Questions, Problems and Forms

BY

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TABLE OF CONTENTS.

PART I.

INTRODUCTORY.

CHAPTER 1.

DEFINITION AND DISTINCTIONS.

686170

C. Division of Personal Property into Tangible and Intangible.

CHAPTER 2.

HISTORY OF LAW OF PROPERTY.

PART II.

WHETHER CERTAIN PROPERTY IS PERSONAL OR REAL.

CHAPTER 3.

THINGS ANNEXED TO LAND. LAW OF FIXTURES.

A. The Manner of Annexation.

CHAPTER 4.

INCREASE OF THE EARTH.

CHAPTER 5.

WATER, ICE, ETC.

PART III.

THE ACQUISITION OF TITLE TO PERSONAL PROPERTY.

CHAPTER 6.

A. Acquisition by Purchase.

B. Acquisition by Gift.

C. Acquisition by Finding.

D. Acquisition by Reduction to Ownership.

E. Acquisition by Confusion and Accession.

PART IV.

ESTATES IN REAL PROPERTY.

CHAPTER 7.

CLASSIFICATION OF ESTATES IN REAL PROPERTY.

CHAPTER 8.

ESTATES IN FEE SIMPLE.

CHAPTER 9.

THE LIFE ESTATES OF DOWER AND CURTESY.

CHAPTER 10.

CONVENTIONAL LIFE ESTATES.

CHAPTER 11.

ESTATES LESS THAN FREEHOLD—LANDLORD AND TENANT.

CHAPTER 12.

ESTATES IN REMAINDER AND REVERSION, AND EXECUTORY DEVISES.

CHAPTER 13.

SEVERAL AND JOINT OWNERSHIP OF ESTATES.

CHAPTER 14.

ESTATES OWNED LEGALLY OR EQUITABLY—USES AND TRUSTS.

D. Incidents of a Mortgage.

E. Sale of the Mortgaged Property and Transfer of the Debt.

F. The Remedy of the Mortgagee.

G. The Remedies of the Mortgagor.

H. Junior Mortgages.

PART V.

BOUNDARIES; AND RIGHTS IN ANOTHER'S LANDS.

CHAPTER 17.

BOUNDARIES AND RIPARIAN RIGHTS.

CHAPTER 18.

PROPRIETARY RIGHTS IN THE LAND OF ANOTHER.

A. Easements and Profits.

B. Right to Lateral Support.

PART VI.

OF THE ACQUIREMENT OF TITLE, EXCEPT BY DEED, WILL AND DESCENT.

CHAPTER 19.

A. Title by Prescription and Adverse Possession.

B. Title by Escheat and Forfeiture.

C. Title by Accretion.

PART VII.

OF TITLE BY DEED.

CHAPTER 20.

THE CAPACITY OF PARTIES TO GRANT AND TO RECEIVE BY DEED.

CHAPTER 21.

OF THE VARIOUS CLASSES OF DEEDS.

CHAPTER 22.

THE PARTS AND ESSENTIALS OF DEEDS.

CHAPTER 23.

RESTRICTIONS IN DEEDS UPON THE USE OF PROPERTY CONVEYED.

PART VIII.

TITLE BY DESCENT AND BY WILL.

CHAPTER 24.

TITLE BY DESCENT.

CHAPTER 25.

THE VALIDITY OF WILLS.

A. Definition and Kinds of Wills.

B. Of the Capacity to Make a Will.

C. Wills Secured Through Fraud, Undue Influence, Etc.

D. The Formal Requisites.

E. The Orderly Parts of Wills.

F. The Revocation of Wills.

CHAPTER 28.

ADMINISTRATION OF ESTATES.

A. Starting the Administration.

B. Abstracts of Title and Guaranty Policies.

C. The Torrens System of Registering Titles.

D. Remedies of the Purchaser and Seller.

THE LAW OF PROPERTY.

THE LAW OF PROPERTY.

PART I.

INTRODUCTORY.

CHAPTER I.

DEFINITIONS AND DISTINCTIONS.

Sec. 1. THE TERM "PROPERTY" DEFINED. The word "property" is used in two senses: to indicate the right and interest which a person has in anything which the law makes the subject of ownership, and second, to indicate the thing in which this right and interest is held.

The word "property" as frequently used, indicates the right of dominion which one person may have over anything which the law makes the subject of ownership and it is this significance we have in mind when we say that the property in an automobile is in A. B. But the term is used also to indicate the thing itself which is the subject of such right of dominion.

The word "title" is used synonymously with "property" to indicate ownership, as when we say the title is in A. "Possession" is a term indicating that one actually has a thing. He may have no right to have possession yet still have it, and he may have a right to possession, but not possession itself; and he may have a right to posses-

sion though another is the owner, as where he is contractual bailee.

A. The Division of Property into Real and Personal Property.

Sec. 2. REAL PROPERTY AND PERSONAL PROPERTY DEFINED. The term real property signifies that property which is of a fixed, immovable nature. The term personal property signifies property which in its present state is of a movable, temporary character.

It has been said that the distinction between real and personal property is merely historical and not logical. But there are important differences in the very nature of things between that which we call real property and that which we call personal property and this distinction is entirely logical. There is a real difference between that sort of property, as a pocket knife or cane, which we can carry away, conceal or destroy, and a piece of land which is fixed and permanent. And the law makes, as men in the usual dealings of life, make, important distinctions. Real property includes the ground and all that is attached thereto for its permanent improvement. Personal property is every other species of property. Thus A owns several acres of land. He puts thereon a house, a barn, fences, and a windmill. All of these things are real property. He may indeed remove them and make them personal property. But until he does so, they are a part of the real estate. If he sells the farm, describing it by metes and bounds, all of these improvements become the property of the buyer of the farm though no mention is made of them.

Property *must be either* real or personal, although we will find that from different *standpoints*, some property

which is near the border line may be regarded as either real or personal. But judged from the same standpoint (and as for most property judged from *any* standpoint) at any given moment property is either personal or real.[1]

Property though at any time either personal or real may be at *different* times personal and real. Thus clay in its natural state is real property. Being removed and placed in wagons, it becomes personal property. Baked into bricks, it is personal property. Built into a house it becomes again real property. The house is torn down and the bricks scattered upon the ground. The property is again personal. The same may be said of a tree, cut down, made into benches and these nailed to the floor of a schoolhouse.

Real property we also call "realty" and "real estate;" personal property we call "personalty," and "personal estate."

We will now consider some practical differences in the law applicable to these two sorts of property.

Sec. 3. SOME PRACTICAL DIFFERENCES IN THE LAW, BASED UPON THIS DISTINCTION.

(1) As to descent and distribution.

Real property of a deceased person in case he leaves no will goes direct to his *heirs,* and in case he leaves a will, direct to the devisees therein named. *Personal* property of a deceased person, in case he leaves no will

1. Property is sometimes said to be real, personal or *mixed.* But by the word "mixed" is indicated property which may be regarded either as real or personal from different standpoints. It is believed that in all cases property is from any particular standpoint at any instant of time either real or personal. It either goes with the real estate or it doesn't and the use of the word "mixed" is unfortunate.

goes to the administrator, or in case he leaves a will to the executor (or administrator if no executor). After payment of debts it is to be transferred to the distributees, or legatees.[2]

(2) As to transfer of title inter vivos.

The law makes a distinction between personal and real property in respect to the method of transfer from one living person to another. Real property can be transferred only by deed, a formal instrument of much importance. It is true title to real property may be acquired without any writing, as by adverse possession, but this is not transfer by one person to another. But *personal property* may be transferred (as it usually is) by mere delivery of possession, as where one purchases goods at store and when a bill of sale or other writing is given it is more to be regarded as the evidence of the transfer, while the deed to real estate when delivered, itself effectuates the transfer of ownership.

(3) As to dower and title by marriage.[3]

By the common law a husband had certain rights in the property of his wife. He took her *personal property* as his own absolutely. In her *land* he got merely a temporary estate called, while the wife is living, an "estate during coverture" and after her death, the husband surviving her, called an "estate by curtesy." These estates are only life estates and therefore cease entirely with the death of a husband just as a tenancy in land

2. See Part VIII *post* for extended discussion on the subject of Estates and Wills.

3. Considered more at length hereafter.

ceases when a term expires for which it was created. Modern statutes have taken away the right of the husband to his wife's personal property and many states have also changed the estate of curtesy, although in all states a husband has still certain rights in the land of his wife.

The wife by her marriage acquired no rights to the personal property of her husband and does not do so now. Of course upon the husband's death the wife has certain rights and takes a part of the personal property of which he may die possessed but that is an entirely different matter. In the land of the husband the wife gets a dower interest which is called inchoate during his life and which becomes at his death, if she survives him, a dower estate, which is a one-third interest for life which the wife has in the land of her deceased husband. It is only a life estate and terminates absolutely at her death.

(4) As to right to remove.

We will see in our study of fixtures that certain property may be removed if it is to be regarded as personal estate and cannot be removed if it is to be regarded as real estate. Of course the owner of the land can always tear down his buildings or dig up his soil and thereby convert real property into personal property, but where the rights of two parties are concerned, as that of landlord and tenant, or that of seller and buyer, one claiming the real property and the other the personal property, the question becomes very important what is to be regarded as personal property and removable as such.

(5) As to local law applicable.

We may say as the general rule that the law of the place in which real estate is situated governs it entirely,

while for some purposes personal property is to be regarded as situated at the domicile of the owner no matter where it actually is.

B. The Division of Real Property into Lands, Tenements and Hereditaments.

Sec. 4. IN GENERAL.

Blackstone [4] stated that things *real* are usually said to consist in lands, tenements or hereditaments. There is little if any practical distinction between "tenements" and "hereditaments," but they are both words of greater significance than "lands." All three terms may be included in the term *"real estate,"* but their separate consideration may serve to illuminate the meaning of that term.

"Land comprehends all things of a permanent substantial nature, being a word of very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation, it is only applied to houses and other buildings, yet in its original, proper and legal sense, it signifies everything that may be *holden* provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. * * * But an hereditament, says Sir Edward Coke, is by much the largest and most comprehensive expression for it includes not only lands and tenements, but whatsoever may be *inherited,* be it corporeal or incorporeal, real, personal or mixed." [5]

4. Blackstone's Commentaries, Cooley's Ed. Book II, star page 16.

5. Id.

Sec. 5. LAND, OR CORPOREAL HEREDITAMENTS. Land is a term meaning the ground, and all that is permanently added thereto by nature or the hand cf man, and the earth under the soil and the space above.

"Land" is a term synonymous with "corporeal hereditament" and signifies that sort of real estate which is substantial and permanent, as distinguished from that which is of an intangible nature. By the word land we mean the ground, and that which grows thereon or has been attached thereto, for permanent purposes. It includes not only the surface, but all below to the center of the earth, and all above *"ad coelum."* Hence, ownership of lands signifies ownership of all minerals under the earth, with right to use the same; and signifies the right to prevent projections above his land by the property of others.[6]

If the tree of one adjoining owner extends its branches over the other land, the owner of such land, so overhung may cut off such branches, but in so far only as they overhang. He is not entitled, however, to the fruit of the overhanging branches.

Land is capable of division horizontally into superimposed legal ownerships, so that one person may own the surface; another person, the minerals beneath the surface.[7]

Water is also included in the term *land* "which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of the *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measures,

6. Murphy v. Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309 (suit in ejectment will lie to oust defendant whose property overhangs plaintiff's property).

7. Neuhoff v. Mayo, 48 N. J. Eq. 619, 23 Atl. 265.

for twenty acres of water; or by general description, as for a pond, a watercourse or a rivulet, but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary property therein." [8]

Sec. 6. INCORPOREAL HEREDITAMENTS. An incorporeal hereditament is a right issuing out of a thing corporate whether real or personal, or concerning or annexed to, or exercisable within the same.[9]

We usually think of real estate as being something very tangible, indeed, and usually any intangible rights are considered in the nature of personal property, but there are some so closely connected with the use of real estate, that they partake of its nature, and are classed as real estate.

An incorporeal hereditament is *real estate* of an intangible nature. It is distinguished from a corporeal hereditament mentioned in the last section in that it is not the land itself, but some right in the land and exercisable in connection therewith. But these rights although incorporeal are real estate. Blackstone's use of the phrase "whether real, *personal* or mixed," is unfortunate in conveying a contrary impression, which he does not mean to give, for his illustrations of "personal property" which constitute hereditaments are those of articles that are by custom or usage to be treated as real property, descending to the heir. The different sorts of incorporeal hereditaments are described below, very briefly. They are,

8. Blackstone, Book II, p. 18.
9. Id., page 19.

mostly, obsolete, and many of them never obtained at all in this country.

(1) *Advowson.*[10] An advowson was an old form of property of an intangible sort signifying a right of presentation to a church, that is to say, it was the right which a person had because he had built a church or made some gift, to name the minister to officiate therein. This form of property is unknown in America.

(2) *Tithes.* A tithe was a right to a tenth part of the increase yearly rising from land and animals.[11] Those things were tithable which were of annual increase. This was a species of property belonging to a church or the clergy and existed as a matter of right in various cases. Any person may now give a tenth part of his income to a church but this probably would not be called a tithe, because the church has no legal right to demand it; but tithes in the old days were legally demandable. These like advowsons are unknown to our law although they were known to the English law from early times.

(3) *Commons.* A common was a right which a man had to make substantial profit from the land of another. This sort of right is also known by the name of "profit a prendre." Commons are of four sorts, and are discussed later.[12]

(4) *Ways or Easements.* A way or an easement is the right of one to go upon the land of another.[13] It differs from a common or profit in that it does not give the right to take anything from the land but merely to make a certain use of it. It differs from the right of a tenant, because he *occupies* the land, while the owner of an easement has no exclusive possession, but merely a

10. Id., page 21.
11. Id., page 24.
12. See Sec. 136, *post.*
13. See Sections 130-135, *post.*

right to go and come upon the land which is in the possession of another.

Easements are of two sorts, "appurtenant" or "in gross" but as they are hereafter discussed at length we may not dwell upon them here.

(5) *Offices.*[14] An office was a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging.

(6) *Dignities.*[15] Dignities consisted in the right to honors and offices, as those of dukes, marquesses, earls, viscounts, and barons. They are unknown to our American law.

(7) *Franchises.*[16] A franchise is a right which one has to do things which by the general law he would have no right to do: Thus we may have the right of certain persons to carry on business as a corporation. This they cannot do except by the franchise of the state. There were many sorts of franchises in the old law which are now obsolete, and which consisted in rights claimed by grant of the king, to have certain privileges, as the right to wrecks, estrays, etc. Under our American law franchises are not presumed to be given to favored individuals but merely to those who comply with the law. The possession of a franchise signifies the possession of a right which could not be exercised without the franchise, thus, with the right to be a corporation, or to operate street railways. The franchises that we know would not be classed as *real,* but personal property.

(8) *Corodies or Pensions.*[17] A corodie or pension

14. Blackstone, Book II, 36.
15. Id., 37.
16. Id.
17. Id., 40.

is a right to receive certain allotments for one's maintenance.

(9) *Annuities.*[18] An annuity is the right to have a certain amount every year from some layman. By contract, as with an insurance company, one may now have an annuity, but we do not have annuities as they were originally known in England.

(10) *Rents.* A rent is defined as a certain profit issuing yearly out of land and tenements corporeal. It may consist in money or goods or services. There were various sorts of rent at common law which we need not take the time to discuss here. The modern law of landlord and tenant is discussed fully hereafter.

C. Division of Personal Property into Tangible and Intangible Personal Property.

Sec. 7. IN GENERAL. Personal property includes all tangible objects (not classified as real property) and all intangible rights not classified as real property.

We have already considered that real estate may be tangible or intangible, although it is in great part tangible, the intangible species being quite generally obsolete. Personal property may also be divided into that which is tangible and that which is intangible and the intangible classes are large and numerous.

Tangible property consists, of course, in objects, as chairs, tables, animals, and the like, and inasmuch as the object of this subdivision is to merely notice the different kinds of personal property, nothing further need be noticed in respect to tangible personal property.

18. Id.

Sec. 8. INTANGIBLE PERSONAL PROPERTY: CHOSES IN ACTION. A chose in action is a right to reduce something to possession by a suit at law.

Personal property which one has in his possession or enjoyment is frequently termed a *chose in possession,* and a right to sue to reduce something to possession is called a *chose in action.* Thus, a chair possessed by one is a chose in possession, but a right to sue on a promissory note, or a right to sue for breach of contract to sell a chair, is a *chose in action.* Choses in action are therefore of the nature of intangible personal property, but all intangible properties are not choses in action, as for instance a patent, but an infringement of the patent would give the owner of the patent a right to sue and thus would be a chose in action for the recovery of damages. The word is not always used in the same sense, but more generally describes rights to sue in contract or for the commission of torts consisting in injuries to property.[19]

Sec. 9. VARIOUS FORMS OF INTANGIBLE PERSONAL PROPERTY. Below are enumerated some forms of intangible personal property.

(1) *Patents.* A patent is a right, granted by sovereignty to exclusively make, use and vend an invention, for a period of years.

(2) *Copyrights.* An author has a right to prevent others from making use of his intellectual productions, until he publishes the same to the world. By statute, he is allowed to retain the exclusive right of publication for a period of years by complying with the copyright law.

(3) *Trademarks.* A person may acquire a right in connection with his trade, to the exclusive use of a mark

19. Gibson v. Gibson, 43 Wis. 23.

or word used by him upon the goods sold by him, provided his use thereof has been prior to that of others on the same class of goods and provided the mark or name is fanciful, that is not merely descriptive or geographical.

(4) *Good will.* A good will of a business is a very valuable species of property. It may be sold in connection with the business, but cannot be disposed of independently.[20]

(5) *Stock in corporations.* Stock in a corporation is personal property. The property is the stock, itself, and the certificate is a mere evidence thereof, useful but not essential. Stock in the corporation is personal property though the corporation own nothing except real estate.[21]

(6) *Partner's interest in partnership.* A partner's interest in a partnership is intangible personal property. It is true he owns, in tenancy in partnership the property of the partnership, but his right in that property is not to any portion thereof, but merely to have his share of the profits after the debts are paid, the assets disposed of, an accounting had. His right is personal property, although the property of the partnership is all realty.[22]

20. Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, at 446.

21. Arnold v. Ruggles, 1 R. I. 165; In re Jones, 172 N. Y. 575, 65 N. E. 570 (joint stock company) citing cases.

22. Uniform Partnership Act.

CHAPTER 2.

HISTORY OF THE LAW OF PROPERTY.

Sec. 10. ANCIENT LAWS OF PROPERTY. The laws of property from early until modern times were based upon feudalism, and in our law, even to-day, we see the influences of feudalism though the system itself no longer exists.

Space will not permit us to go at length into a discussion of the subject of feudalism, and the reader is referred to other authors for extensive inquiry therein.[23] But we should take occasion to examine very briefly this system which entered so extensively into the life of our European ancestors and from which our laws of property have been historically developed.

Feudalism concerned itself almost wholly with *real* property. Personal property in those days was inextensive in quantity and had little value. Only *real* property was held in feudal tenure.

Sec. 11. FEUDALISM AND THE FEUDAL TENURES. Feudalism was a military system whereby all land was held from the sovereign, mediately or immediately, who parcelled it out in return for fealty and service.

Whatever may have been the origin of feudalism, it was established in Europe by the tribes that swept over Europe at the decline of the Roman empire. It was

23. See Blackstone's Commentaries, Cooley's Ed. Bk. II, ch. IV. Pomeroy, Municipal Law, ch. 2.

firmly established on the continent by 800; and in England under William the Norman.

By the feudal system the absolute ownership was in one person, a lord, or "landlord," while the use was in another known as the tenant, to whom the possession, or, as it was called, the "seisin" was given.

In England the ultimate owner was the king. But in course of time the tenant further parcelled out the land in the same way to his vassals, and these in turn, again, so that the actual occupiers and users of the soil might be many times removed from the king in whom the true ownership theoretically existed.

The system was in its origin and early development entirely military. The lord allotted the lands in return for fealty and service.

These allotments were known as "feoda, feuds, fiefs or fees." The holder of the feud was said to be *enfeoffed.*

The manner of enfeofment was as follows: First, the vassal established his *homage* to the lord. This was a ceremony in which the vassal entered into submission to his lord and became his "man," saying apt words to that end. After homage came an *oath of fealty.* Then came the transfer of the land.

This was done by conferring the present possession either by actual yielding of possession or by symbol. By the first method the land was given over before witnesses, the tenant going upon the land and publicly taking possession. By the second method a twig, piece of sod, or other symbol taken from the land was handed over in view of witnesses. No method of conveying land to take effect *in the future* was known, From this practice, it came to be said that in the conveyance of the fee by deed of feofment there must be *livery of seisin.*

The service which the vassal was to furnish was originally of military character and the system was purely

military and arose out of military needs. The vassal was under obligation to furnish military aid as his lord might call upon him. If a vassal of the crown were called upon he could bring in a large array of his retainers to whom he in turn had granted lands.

Blackstone says that fiefs were at first granted at the lord's will, but others doubt this, and assert they were granted for life subject to fealty. In course of time they became inheritable.

At first the lord could not transfer his right of allegiance nor the tenant his land. But after a time the tenant was permitted to alien the land. Rules of descent came to be established and it became the law that the descendants of the tenant were to be his successors in the possession and ownership of the fee, but in order to keep this inheritance from division, the eldest son was the particular descendant in whom the right vested. Thus arose the rule of *primogeniture*.

The incidents or consequences of the feudal estate were as follows:

(1) *Escheats.* If the vassal died leaving no heir, his estate would return to the lord, who owned it; also, by disloyalty the estate escheated.

(2) *Aids.* Aids were payments of money made to the lord for certain purposes; to ransom his person; to pay the expense of the knighting of the eldest son; to raise a marriage portion for the lord's daughter. These payments were probably voluntary at first, but came later to be demanded as of right, and new causes of aids were invented until they became a source of great burden. *Magna Charta* provided that no aids should be demanded except for the three purposes mentioned.

(3) *Reliefs.* A relief was a sum of money to be paid by the heir upon coming of age and taking the inheritance. It was at first an arbitrary sum and grew

to be so burdensome that a law was passed to fix the amount payable.

(4) *Primer Seisin.* This was a sum payable to the king by the crown's vassals equal to the first year's profits when the heir came into possession; it was in addition to the relief.

(5) *Fines upon Alienation.* A fine payable by the vassal to his lord upon the conveyance of the fee.

(6) *Wardship.* Where the tenant died before the heir was of age, the lord had the right to be guardian of the heir and take the profits of the fee until he arrived of age. This was a very onerous incident.

(7) *Marriage.* A lord who had a female ward (the tenant having died before the heir was of age), could dispose of her in marriage. If she would not accept the proffered husband she was liable to a heavy fine. This power was supposed to be based on the right of the lord to have no one except his friends and supporters marry the female occupiers of the fee.

These burdens became so great as not to be borne. By statute in the time of Charles II they were utterly abolished.

The relation which the tenant had to his lord was governed by the *tenure* or kind of *holding* by which the tenant held the land. Tenures were very numerous, but were principally of three general kinds:

(1) *The Military Tenure,* whose incidents we have just mentioned, the services to be granted being of a military nature. This is the true or proper feudal tenure.

(2) *Tenures in Free Socage* to which by statute all tenures were ultimately reduced. The services to be rendered were not those of war, yet such as were not regarded as base in nature, as, to pay a sum as rent. These are not pure feudal tenures, but are a natural development with the growth of society. These tenures had all the

burdens as those above mentioned except of wardship and marriage.

(3) *Tenures in Villenage or Base Tenures.* Tenures in villenage were tenures calling for what were then regarded as base services, that is, menial duties. These tenants lived in *villages* near the lord's castle, and were called *villeins.* There were two sorts of tenures in villenage, those in *pure villenage* in which the tenant must give all services called for, and *villenage in socage,* in which the amount of the services he could be called upon to do was limited.

This was the system of feudalism so far as we may notice it here. It made great distinctions between real and personal property which are preserved to some extent to-day. It made personal property subject to seizure for the ancestor's debts, but not real property. This is not wholly true to-day, but the personal property of a deceased person is first subject to the ancestor's debts, before the land can be taken. This is a remnant of the feudal system. So doubtless is the rule that passes the real estate direct to the heir but puts the title to personal property in the executor or administrator.

Sec. 12. THE TENURE IN AMERICAN LAW. Land in America is held allodially, that is, by all owners in equality without superior.

The fee (a term which we get from the feudal system), is in America held *allodially.* There is in theory no superior. An owner can indeed rent his land for services to be rendered, but there is here nothing resembling the feudal system. Land is not held of the government, and there is but one sort of tenure.

Sec. 13. HISTORY OF THE LAW OF PERSONAL PROPERTY. **As the age became commercial, personal property grew in importance and a large body of law concerning it developed.**

In the day of feudalism personal property was of little importance. The activities were those of war and agriculture. With the dawn of our commercial age, personal property became of much importance and there are now more litigated cases concerning personal property than concerning real property. A great portion of this law deals with sales.

PART II.

WHETHER CERTAIN PROPERTY IS REAL OR PERSONAL.

CHAPTER 3.

THINGS ANNEXED TO THE LAND, THE LAW OF FIXTURES.

A. The Manner of Annexation.

Sec. 14. INTRODUCTORY.

It has been seen that the term "land" comprehends not only the earth but things that are attached thereto. Popularly, as well as technically, this is understood. When we speak of a person's "real estate" we mean his improved lands as well as his vacant lots. An owner may, of course, at any time sever the attachments from the realty and thus make the detached property personalty. But whether attachments to the real property are always and from all standpoints real property, is a question that arises when there are conflicting interests involved based on the question whether property is real or personal. A *tenant* of the land may at the end of the term remove from the land all his *personal* property—are all the annexations made by him to the real property themselves real property or do they retain their character as personalty? An *owner* who sells his real property may take therefrom his personal property—are all attachments

made by him a part of the realty which is included in the sale? What does a mortgage of real estate include? If a testator gives his real estate to one son and his personal property to the other, does the first son take all that is annexed to the realty? It is in ways of this character that the question arises whether property is or is not a part of the real estate. And the subject involved is called the law of *fixtures*.

The word *fixtures* is employed in two senses: sometimes to indicate that the property described as a fixture can be removed and sometimes to indicate that the property so described cannot be removed. In the latter sense it is perhaps more frequently employed as when we say a certain article is a fixture and must go with the real estate; but it is used also in the former sense, as when we say that a tenant can remove fixtures. We will avoid this difficulty by speaking of *annexations,* and attempting to indicate when and for what purposes they are to be considered as part of the real estate and when and for what purposes they are not.

Sec. 15. ANNEXATION TO REAL ESTATE MAY BE ACTUAL OR CONSTRUCTIVE. Articles may be annexed to the real estate so as to become, for some purposes, real estate, by actual annexation and by constructive annexation.

Ignoring for the present time, considerations that might prevail to make a specific annexation realty for some purposes, but not realty for other purposes, we may notice that there may be incorporation into the real estate by *actual* fastening to the real estate, or by *constructive* annexation.

Actual annexation consists in actually joining to the real estate, as by nailing shelving to a house, or imbedding

posts in the ground, or by installing a bathtub by attaching it to the plumbing system of the building.

But it can readily be seen that this circumstance of actual joining ought not to be always determinative. Things may be as actually joined for permanent improvement purposes without any actual fastening as they may be *with* such actual fastening. For instance, a rail fence which maintains its permanent position by mere weight, is obviously as much a part of a farm as a fence consisting of boards nailed to posts sunk in the earth. It is apparent therefore, we must seek some other test than that of actual joining to the real estate. It is true that actual joining by nailing, imbedding in the ground, or otherwise, generally makes the article so affixed a part of the real estate (for certain purposes) but that, after all, cannot be the true test, but obviously also it will generally be the evidence of the true test.

What is the test? It is, in general language, the *intention* of the party making the annexation, that is, the intention the law must impute to him (whether his actual intention or not) in annexing the article. What intention? The intention to make the added article a permanent part of the place for its improvement *as* real estate, and that depends on (1) the *relationship* of the party to the place, and (2) the *character of the annexation*. An *owner's* annexations are obviously from a different motive than those of a tenant. But even a tenant cannot remove what he has added when the removal would injure the freehold. In such a case we must presume he intended to make it permanent notwithstanding his own transient interest.

As before stated, the annexation may be actual or constructive; for even though not actually nailed to, or screwed down, or imbedded in, or otherwise actually joined, if an article is placed upon real estate with the

intention (within the test proposed in the above paragraph) of making it a permanent improvement thereof, it becomes a part thereof. There are two well known cases of constructive annexation—one, where mere weight is the usual and practicable way of making the addition for permanent purposes, the other, where removal is made at times without the intention of permanent removal, as screens that are taken off for the winter season, or storm doors that are removed for the summer season, or a part of a machine is removed for the substitution of another in the same place.

Generally speaking, a piece of *furniture* is not a fixture. But it may be one, as a bench that is built in, or a mirror that is a part of the wall or door.

Generally also *utensils* are not a part of the real estate, but they may be, as some illustrations below will indicate.

Sec. 16. ANNEXATIONS TO REAL ESTATE BY THE OWNER OF THE REAL ESTATE. Whatever is constructively or actually attached to the real estate by the owner for the purpose of improving such real estate in the use to which it is being put, becomes real estate, and on sale of the real estate by the owner without reservation, the attached articles pass therewith as a part thereof, though not mentioned.

Real estate to be useful, must be improved, and the improvements add to its value. Whatever is put upon the real estate by the owner thereof obviously to improve it as real estate, and not merely to *furnish* it, is deemed to be put there to add to its efficiency and increase its value. True, the owner may remove at any time what he has attached, but if the rights of purchasers intervene, he cannot remove. What is it that becomes real estate, so that it will pass by a transfer of the land, unless reserved, even though the deed is to the land alone?

Clearly all buildings will pass, as will the fences, the pumps, the windmills, the walks and other improvements; as will all things that are part of such things, as shutters and screens, although perhaps stored in the basement or attic.[24] But mere *furniture* will not pass, as an organ, yet if as in the case of a church an organ is a part of the general scheme of architecture, it will pass.[25] So chairs put in a theater for the purpose of seating the audience are a part of the theater and pass with a sale thereof.[26] As of course are the scenery, curtains and the like.[27]

So if a manufacturing plant is sold, all will go therewith which is essential to its completeness as such plant [28] even though not actually attached, or attached by mere weight, or out of place because a substitute is at the time in place (as circular saws for use on the same shaft). But supplies for use in the factory, as for instance paper in a newspaper plant, would not pass. The question is what articles have been added by way of permanent improvement, and what by way of mere furniture, stock in trade, supplies, etc.?

Whether ice boxes, electric light fixtures, cooking ranges, and the like in dwelling houses become a part thereof seems not uniformly established. It would seem that if they are an integral part of the building they ought to pass. It would doubtless surprise the purchaser of an apartment building if it should be said that the seller could strip it of electric light fixtures, gas ranges and ice boxes. And it is doubtful if it would be held

24. Roderick v. Sanborn, 106 Me. 159, 76 Atl. 263.
25. Rogers v. Crow, 40 Mo. 91.
26. Gould v. Springer, 206 N. Y. 641, 99 N. E. 149.
27. Murray v. Bender, 125 Fed. 705.
28. Equitable Guarantee & Trust Company, 8 Del. Ch. 106, 67 Atl. 961.

that they could be removed. Thus ice boxes have been held part of a flat building although not physically attached where one was placed in each flat.[29] So, the New York Court (in a mechanic's lien case[30]) while saying inconsistently in one breath that "gas and electric fixtures, as ordinarily attached to a house or other building for use, are in actions between grantor and grantee, landlord and tenant and mortgagor and mortgagee, held to be personal property" immediately follows with the statement "we may, however, take judicial notice of the fact that such fixtures often pass with real property bought or leased, and are unlike articles of furniture, pictures, carpets and hangings, which are easily and customarily moved. They resemble rather furnaces and ranges which are built in and left as a part of the property itself, passing with it from vendor to vendee and from landlord to tenant."

This latter view certainly seems the sound one and consistent with custom and the understanding of sellers and buyers.

Sec. 17. ANNEXATIONS BY SELLER IN POSSESSION AFTER SALE. The annexations of a seller who is in possession after the sale are to be regarded in the same way as those annexations before the sale.

The same rule applies here as in the section above. The annexations of the former owner, unless he has a lease (in which case he is to be considered as any ordinary tenant), become a part of the real estate and accrue to the new owner.

29. Williams v. London, 115 N. Y. Suppl. 547.
30. Wahle-Phillips Co. v. Fitzgerald, 225 N. Y. 137, 121 N. E. 762 (1919).

Sec. 18. ANNEXATIONS BY PURCHASER IN POSSESSION UNDER A DEFEASIBLE TITLE. A purchaser who goes into possession under a title that may revest in the seller is to be regarded as making annexations for the permanent improvement of the land and if the title revests in the former owner the annexations pass to him.

One who goes into possession under a defeasible title or under a contract of sale or under a conditional sale of any sort whereby because of nonpayment of installments or other failure the title may revest is to be regarded as having a permanent interest in the land and therefore his improvements are to be regarded as permanent ones, and the same rule applies in his case as in the case of any owner, and the annexations will pass upon the defeasance of his title to the former owner. Thus if A sells property to B under a contract of sale whereby B is to make twenty monthly payments before he shall get a deed, articles annexed by B to the real estate become a part thereof and if B's title by reason of his failure to keep up the installments revest in A, A gets the improvements.[30a] The same rule is true where title has actually vested, subject to a condition that may defeat it.

Sec. 19. ANNEXATIONS OF A MORTGAGOR IN POSSESSION. The same rule applies here as in the case of a grantor as set out in section 16.

A mortgagor in possession is to be regarded as having a permanent interest in the land and his annexations become a part of the security of the mortgagee and cannot be removed after attachment.

30a. Smith v. Moore, 26 Ill. 392.

Sec. 20. ANNEXATIONS OF A MORTGAGEE IN POSSESSION. The annexations of a mortgagee in possession become a part of the real estate.

The same rule applies here as in the case of the grantor as described in section 16.

Sec. 21. ANNEXATIONS BY A TENANT. The annexations of a tenant for household or trade purposes do not become a part of the real estate unless attached in an extensive manner so that their removal would seriously injure the real estate or destroy the identity of the thing attached, but the fixtures must be removed during the term.

When we come to the case of a tenant we consider one who has only a passing right to the land and he is not to be considered as permanently improving the real estate except as the extensive character of the annexation may show that to be true. If a tenant erects permanent buildings upon the land, or fences, or plants trees, or puts up any permanent structure, these are unquestionably a part of the real estate and therefore as soon as annexed belong to the owner, subject to the lease, and cannot be removed by the tenant,[31] but the articles which he attaches for *household, ornamental,*[32] or *trade purposes*[33] can be removed by him even though they are screwed or nailed to buildings, provided a severance of them is not difficult. If a tenant should equip a building with pipes extending through the walls or should place panes of glass in the windows, or should build a porch to the house, he could not take any of these

31. Fletcher v. McMillan, 103 Mich. 494, 61 N. W. 791.

32. Raymond v. Strickland, 124 Ga. 304.

33. Pool's Case, Salk. (Eng.) 368; Ballard v. Alaska Theater Co., 93 Wash. 655, 161 Pac. 478.

down without the consent of the owner, but if he attaches brackets to the wall, towel hangers, etc., in the bathroom, globes to the gas fixtures, or if in his shops he puts up pulleys, sets up printing presses or attaches any sort of machinery not actually built in the place, he can remove them; so a nurseryman can remove trees planted by him for nursery purposes, but not trees of other sorts. The same would be true of shrubs and bushes. The rule to apply in every case is, that if the article is removable without seriously injuring the real estate at that place the tenant can remove it, as it is not to be presumed that he put it there for permanent improvement.

The tenant must remove the fixtures during or immediately at the expiration of the term; he cannot afterwards come back and claim the property left by him. The cases do not all agree as to whether he must remove during his term, or immediately after the expiration thereof.

It has been held that a tenant loses the right to remove if he renews the lease.[34] This is an essentially unjust rule and has been changed or modified in some jurisdictions.

34. Chicago Sanitary District v. Cook, 167 Ill. 134.

CHAPTER 4.

INCREASE OF THE EARTH.

Sec. 22. THIS TERM DEFINED. By increase of the earth we mean the product which grows thereupon either with or without man's assistance.

We are to consider in this chapter the character of those things which grow upon the earth. They may be broadly defined into those things which reproduce themselves perennially and those things which are produced in yearly crops by man's toil. Those fruits of the earth which grow without yearly planting, as vines, trees and grasses are called *fructus naturales.* Those which are produced by man's toil are called *fructus industriales.*

Sec. 23. CHARACTER OF TREES, VINES, ETC. Those things which grow perennially as trees, vines, grasses and the like are real property for all purposes.

Trees except those planted for nursery purposes are a part of the real estate and to be considered as a part of the real property for all purposes. This is true of vines, grasses, and the produce of every sort which is of a perennial nature.[35]

35. Owens v. Lewis, 46 Ind. 488. There is some authority that a contract of sale of standing trees is a sale of personalty but in most jurisdictions, it is considered a sale of realty. Clearly a sale of logs or lumber is a sale of personalty although the vendor may have to reduce growing timber into the lumber or logs in order to perform his contract.

Sec. 24. OWNERSHIP OF CROPS AS BETWEEN BUYER AND SELLER OF LAND. As between the buyer and seller of land, crops pass with the sale unless reserved.

Crops, whether they are mature or immature, pass with the sale of the land unless reserved at the time and the buyer may claim them as a part of the real estate.[36]

Sec. 25. OWNERSHIP OF CROPS AS BETWEEN MORTGAGOR AND MORTGAGEE. The mortgagor is entitled to the crops except upon default.

In the mortgage of the land the crops are to be considered as a part of the real estate. But it must be noticed that the mortgagee has no right to the crops so long as the debt is immature and the mortgagor is in possession. The mortgagee cannot claim the crops in any case even where default has occurred except to reduce the debt.[37]

Sec. 26. OWNERSHIP OF CROPS BETWEEN LANDLORD AND TENANT. The tenant is entitled to the crops except where he plants them to mature after the tenancy ceases.

A tenant is entitled to crops planted by him unless he plants crops to mature after his term is at an end. Where the tenancy is of an indefinite duration the tenant cannot be deprived of the crops which he has been permitted by the landlord to plant, by the landlord's termination of the tenancy.[38]

36. Firebaugh v. Divan, 207 Ill. 287.
37. Wooten v. White, 90 Md. 64.
38. Bittinger v. Baker, 29 Pa. St. 66.

Sec. 27. CROPS REAL OR PERSONAL FOR PURPOSES OF SALE. Crops are considered as personal property for purposes of the sale of the crops.

Growing crops may be sold as personal property.[39]

Sec. 28. CROPS, REAL OR PERSONAL, FOR PURPOSES OF LEVY. Crops are personal property for the purpose of levy by an officer of the law under an execution.

Crops are to be considered as personalty for the purpose indicated.[40]

39. Davis v. McFarlane, 37 Cal. 634.
40. Polley v. Johnson, 32 Kan. 478.

CHAPTER 5.

WATER AND ICE, ETC.

Sec. 29. CHARACTER OF WATER AS PERSONAL OR REAL. Water is real property while in ponds, rivers, etc., but becomes personal property upon being piped out or bottled or in any way separated from the soil.

The water in a pond or river or lake is not susceptible of ownership, in the sense that any particular particles thereof can be permanently claimed, for water is a "movable, wandering thing"[42] subject to evaporation, and passing from one man's land to another, but in the sense that the rights to ponds and rivers pass with the real estate, the water which is at any particular time on the property may be considered a part of the property. When water is bottled or carried away in any manner it becomes personal property.

Sec. 30. CHARACTER OF ICE AS PERSONAL OR REAL. Ice is to be considered as a part of the real estate unless cut therefrom, in which case it becomes personal property.

The ice on a man's land is real estate; being gathered, it becomes personal property.[43]

42. See quotation from Blackstone, on page 29, *supra*.
43. But it is held that ice while in its natural state may be sold as personal property. Higgins v. Custerer, 41 Mich. 318.

Sec. 31. CHARACTER OF ROCKS, STONES, ETC. Rocks and stones whether imbedded in the soil or lying upon it in the natural position are a part of the real estate; but being gathered they become personal property.

It is clear that rock, and stones are a part of the real estate, and pass with a sale thereof.[44] Rock quarried out of the land, would by becoming detached therefrom, lose its character as real estate.

44. Oil is a mineral and is real estate until it comes into a well. Nonamaker v. Amos, 73 Ohio St. 163.

PART III.

THE ACQUISITION OF TITLE TO PERSONAL PROPERTY.

CHAPTER 6.

A. Acquisition by Purchase.

Sec. 32. IN GENERAL. The title to personal property may be transferred by sale from one owner to another.

By the word "sale" we mean the transfer of ownership of personal property from one person to another for a consideration called the price. By a contract *to sell* we mean a contract to make such a sale. When ownership passes from one person to another, we say that *title* passes. There are a number of rules for determining when this title passes, the two basic rules being that title to future goods and to unascertained goods cannot pass; and that when the goods are ascertained, title passes according to the intention of the parties; there being a number of rules designed to arrive at that intention. As a separate volume in this series is devoted to Sales of Personal Property, further discussion is not made here.

B. Acquisition by Gift.

Sec. 33. GIFT DEFINED. A gift may be defined as a transfer of ownership of personal property without consideration.

A gift is a transfer without consideration. There may be a valid contract to make a sale, but none to make

a gift, for if we assume we have an enforceable contract our definition of a gift prevents us from calling this contract or any execution or result of it, a gift. A gift is gratuitous, made as a favor and not as a duty. It becomes apparent then that a gift must take effect at once and that there can be no executory contract to make a gift. Either title passes when the gift is made or there is no gift.

Sec. 34. GIFTS ARE INTER VIVOS OR CAUSA MORTIS. Gifts may be described as those made between living persons or those made in contemplation of death, to take effect upon death.

Most gifts are those between living persons, but a person may make a gift in contemplation of his impending death. We call the former class of gifts those *inter vivos* and the latter class those *causa mortis*.[45] There is an importance in distinguishing between these two sorts of gifts because the gift *inter vivos* when finally made is irrevocable while a gift *causa mortis* does not take effect if the giver recovers from what he thought, when he made the gift, was his last illness. If a giver then desires to revoke a gift it might depend upon whether it were a gift *inter vivos* or *causa mortis* whether he could do so. (Gifts *by will* are not discussed here.)

Sec. 35. ESSENTIAL ELEMENTS OF A GIFT INTER VIVOS. In a gift inter vivos it is essential that possession be delivered to the donee with the purpose of at that time transferring title.

As we have said there is no such thing as a contract to make a gift of personal property. In order to transfer by gift the gift must actually be made; the giver must

45. Telford v. Patten, 144 Ill. 611.

hand over the article with the intention and for the purpose of transferring title at that time. It is not necessary that he make a manual delivery provided he does some act which may be regarded as a symbolical delivery. Thus, if he should give an article in the warehouse it would be sufficient if he transferred the warehouse receipt, or if he should give a trunk or the contents thereof it would be sufficient if he finally transferred the key.[46]

Sec. 36. IRREVOCABILITY OF GIFT INTER VIVOS. An executed gift inter vivos is irrevocable.

Though there may be no enforceable agreement to make a gift, yet when a gift is actually made, it transfers as complete a title as a sale or barter does. One who receives property by gift becomes the owner thereof, the giver has parted with his rights thereto and no matter how much he may repent he cannot recover what he has given away. A gift actually completed by final delivery is irrevocable.

Sec. 37. ESSENTIAL ELEMENTS OF A GIFT CAUSA MORTIS. In a gift causa mortis there must be actual delivery; the giver must regard himself as in his last illness and must give the property because of his impending death.

In the gift *causa mortis* the same elements in respect to transfer of possession with the intention of passing title must be present. But to constitute a gift *causa mortis* as distinguished from one *inter vivos,* it must be made on account of the death which the giver expects to soon ensue.[47] As we have noticed, if a gift were really made because of death and death does not ensue the article may be recovered and this is the reason for inquiry

46. Marsh v. Fuller, 18 N. H. 366.
47. Telford v. Patten, *supra.*

whether it was a gift *causa mortis.* It must be borne in mind that in a gift *causa mortis,* the possession of the thing must be given over to the donee as completely and finally as in a case of a gift *inter vivos* for if there is simply a promise to make a gift at death this confers no rights to the article and if the statement is made that a person may have a certain article at death this gives no rights unless the statement is made in a regularly executed will.

Sec. 38. RIGHTS OF CREDITORS OF THE GIVER IN RESPECT TO THE GIFT. A debtor who is insolvent cannot deprive his creditors of his assets by giving them away.

While a gift transfers as good title as a sale or barter, yet there is a phase of the law which we will notice here which prevents the donee from getting a good title, *as against the creditors* of the giver, provided the giver is insolvent when he makes the gift or by the gift brings on insolvency. In that case the creditors may, by appropriate judicial proceedings, take the property from the person to whom it was given and this is no hardship upon him for he parted with nothing on account of the gift and ought not to be enriched at the expense of the creditors of the giver.[48]

C. Acquisition by Finding.

Sec. 39. DIFFERENCE BETWEEN LOST PROPERTY AND MISLAID PROPERTY. Lost property is that which has been dropped by the owner, while mislaid property is that which has been put in a certain place and then forgotten.

We know what we mean in popular sense when we speak of a thing as having been "lost" and in such a sense

48. See Subject of Bankruptcy in this Series.

this term is often used to include property which was put in a certain place and its whereabouts then forgotten, but this in the law is known as "mislaid" property as distinguished from lost property. To be *lost,* property must have accidentally dropped.

Sec. 40. THE TITLE OF A FINDER OF LOST PROPERTY. One who finds lost property becomes the owner thereof as against all the world except the true owner.

One who finds personal property which has been lost by the owner becomes the owner against all the world except the true owner no matter upon whose property the lost article was found. Thus, if A loses a diamond while walking over B's land and C finds the diamond, C is the owner as against B and all the rest of the world except A and if A does not claim the stone it becomes C's.[49]

An exception must be made to this rule in the case of chattels which are buried in or attached to the earth for this becomes a part of the real estate and belongs to the owner of the soil. An exception to this exception was made in early days in the case of "treasure-trove" which was gold, silver, or other coin or bullion or plate concealed in the earth and this went, as in the case of lost property, to the finder if the owner was unknown. By an early statute this rule of the common law was changed and treasure-trove vested in the crown but in this country it seems to be the law that treasure-trove belongs to the finder.

49. Hanaker v. Blanchard, 90 Pa. St. 377. In this case a domestic servant found a roll of bills on the floor of a hotel. **Held:** entitled to it against the owner of the hotel.

Sec. 41. THE TITLE OF A DISCOVERER OF MISLAID PROPERTY. Mislaid property belongs to the owner of the place where it is mislaid as against the finder and all the rest of the world except the true owner.

If A goes into B's shop and while there lays a book upon B's counter and then departs forgetting it and C comes in and discovers the book, the title is in B as against C and all the rest of the world except A. As to A, B is bailee of the book but if A never claims it B becomes the owner as to everyone. Thus the rule in case of mislaid property is different from the rule in the case of lost property.[50]

D. Acquisition of Title to Personal Property by Reduction to Ownership.

Sec. 42. PROPERTY WITHOUT OWNERSHIP; WILD ANIMALS, ETC. Animals of a wild nature and any property which has been abandoned by the former owner may be made the subject of ownership by reduction to possession.

Property may be without any private ownership. In such a case it belongs to the sovereign as the representative of the people. It does not belong to the sovereign in the sense that property does which is owned exclusively by the sovereign. Thus, the state of Illinois may own property in the same sense that an individual may, but its ownership of wild animals is of another nature, in this, that anyone may take the title by reduction to ownership. Any such animal can become the subject of owner-

50. Kincaid v. Eaton, 98 Mass. 139. In this case money was left in a bank and discovered by a customer. Held, bank legal custodian thereof as against discoverer.

ship by the one who so reduces him but animals of a wild nature remain the subject of ownership only while they are confined or kept within the control of the capturer, or domesticated. If a wild animal escapes or is allowed his liberty and not recaptured, he becomes again without ownership except by the state. It is also true that the state for the benefit of the people may make such rules concerning hunting or killing wild animals as it deems expedient.

If one is a trespasser upon the land of another he cannot reduce to his possession the wild animals upon that land.[51]

One acquires title to fish in the same way that he acquires it to other wild animals. One cannot fish in the waters belonging to another but he may fish in public waters except that the abutting owner has the exclusive right to the shore above high water mark. For example, any one may fish in the Great Lakes but may not trespass upon the land of riparian owners, in order to do so.[52]

E. Acquisition of Title to Personal Property by Confusion and Accession.

Sec. 43. CONFUSION DEFINED. Confusion consists in the mixture of goods belonging to different persons so that the property of each cannot be identified from that of the others.[53]

We now consider the case of property which becomes commingled with the goods of another so that it is impossible to separate the property into the original masses.

51. State v. Repp, 104 Ia. 305.
52. Cortelyou v. Van Brundt, 2 Johns (N. Y.) 357.
53. Hesseltine v. Stockwell, 30 Me. 237.

The question then arises: to whom do the goods belong? The mixture might be either innocent or wrongful.

Sec. 44. THE TITLE ACQUIRED BY CONFUSION. If confusion is wrongful it seems to be the law that the title of the wrongful doer is lost and the mass belongs to the other party. If the confusion is innocent or by accident each one owns his proportional part and the former owners are owners in common.

The law on the subject of confusion is itself in confusion and the cases have been decided differently, but it seems to be the weight of authority, however, that if goods are wrongfully mixed with the goods of another, the wrongdoer loses his title, especially if the value of his goods is less than the value of the other goods and the same rule seems to apply in the case of one who is merely negligent.[54] It is necessary in these cases in order to have this result, that the goods cannot be separated, for if the mixer can prove the identity of his own goods he does not lose ownership in them.

Where the mixture is innocent then if both parties are responsible they become tenants in common; if wholly due to one party's act the courts will make equitable distribution.

Sec. 45. ACCESSION DEFINED. Title by accession is that title which one gains because the property of another is incorporated with his own, or because he has changed the character of another's property by the bestowal of his labor thereupon.

In *confusion* we have a mixture of similar masses, the character of the new mass thus formed remaining un-

54. Stone v. Marshall Oil Co., 208 Pa. St. 285.

changed, and remaining capable of separation into the original masses by mere division; in accession we have the *incorporation* of one person's property with the property of another so that the separation into the original masses becomes either impossible or at least a matter of *tearing down*, or we have a change in the character of one's property by the labor of another. We assume also that there is no contract or understanding between the parties as to the result. Thus one without another's consent, either with wrong motive or innocently, uses that other's boards in his carriage, or makes that other's clay into bricks, or in making wine uses his own and another's grapes. What of the resultant title?

Sec. 46. THE TITLE ACQUIRED BY ACCESSION. Where accession is innocent the weight of authority seems to be that the owner of the property may follow it and retake it so long as he can identify it but where the accession is wrongful he may retake it together with the articles to which it is added and together with the value of the services which have been bestowed upon it.

The subject of accession like that of confusion is not entirely clear,[55] the cases not being as numerous as might be expected and the authorities being in conflict. It is therefore hard to lay down the rules. It seems, however, that the law may be generally stated about as follows: That if the accession of goods to other's goods has been wrongful the party who has made the addition or bestowed the labor will lose the property and has no right of compensation for his labor, while if the accession is innocent and there has been no loss of identity, the original owner may follow the property, but must make reim-

55. Lampton v. Preston, 1 J. J. Marsh, 454.

bursement for the labor bestowed or additional value. In this case it is necessary that the property do not lose its identity by the accession. It is difficult to state at what point the article loses its identity. Turning wood into lumber, grain into whiskey, and similar changes have been held not enough to destroy identity. Where the accession is wrongful but the increase in value is very great it is doubtful if the original owner would acquire the right to the new article unless it was a deliberate case of theft or malice. Where the article innocently taken does lose its identity, then all the former owner has is a right to recover its value when it was taken.

The authorities are in conflict when it comes to illustrations. Does cloth made into a coat lose its identity? Milk made into cheese? Grain made into malt? Clay made into brick? The authorities are in conflict. In reference to title by *confusion,* one judge says, "Few subjects in the law are less familiar, or more obscure than that which relates to the confusion of property."[56] In reference to *accession,* one court says: "There is therefor no definite settled rule on the question."[57]

56. Rider v. Hathaway, 21 Pick. (Mass.) 298.
57. Lampton v. Preston, *supra.*

PART IV.

ESTATES IN REAL PROPERTY.

CHAPTER 7.

CLASSIFICATION OF ESTATES IN REAL PROPERTY.

Sec. 47. GENERAL STATEMENT. An estate in land is that duration of ownership which one has therein.

A person may own property absolutely or own a limited estate therein. There are many estates. From the following section and the chapters just following we may gain a clear conception of the meaning of this term.

Sec. 48. A TABULATION OF ESTATES. Estates may be tabulated as follows:

A. Present Estates.

I. Freehold Estates.
- (1) Estates in fee, that is, estates without limitation in time.
  1. Fee simple estates, being estates that upon death of the owner without a will go to his heirs generally.
  2. Estates in fee tail, being estates that went on down perpetually to a class of heirs.

(2) Life estates.
  1. Conventional life estates.
    a. Estates for one's own life.
    b. Estates for the life of another.
  2. Legal life estates.
    a. Estates of dower.
    b. Estates of curtesy.

II. Estates Less Than Freehold.
  (1) Estates for years.
  (2) Estates from year to year.
  (3) Estates at will and by sufferance.

B. Future Estates.

I. Estates in Remainder.
  (1) Vested remainders.
  (2) Contingent remainders.

II. Estates in Reversion.

This table is not strictly logical as the future estates in reversion and remainder are also to be classed as estates in fee simple. But it is the table usually employed and fairly indicates the various legal estates. In subsequent chapters we discuss all of these estates.

A freehold estate may be defined as any estate which may last a life time and may be of inheritance. Life estates and estates in fee, are freehold estates.

Any estate less than the fee and less than a life state, is called an estate less than freehold. A lease for 99 years is less than freehold.

CHAPTER 8.

ESTATES IN FEE.

Sec. 49. THE FEE SIMPLE DEFINED. "Tenant in fee simple (or as he is frequently styled, tenant in fee) is he that hath lands, tenements or hereditaments to hold to him and his heirs forever, generally, absolutely and simply, without mentioning what heirs, but referring that to his own pleasure, or the disposition of the law."

The above definition is that of Blackstone (Book II, Ch. 7, p. 104). A fee simple estate is an estate unlimited in time, that is to say, an estate which one holds absolutely, to do with as he pleases (within the law) and which being undisposed of by him at his death goes to his heirs generally, as named by the law. We say that A owns a lot in Chicago; we mean thereby that he owns it in fee simple; that he is not merely a lessee; that he is not merely an owner for life, the real ownership being in another; but that it is *his* forever, and that he may sell the entire interest in the land or dispose of it by will. We say that he holds it to himself and his heirs, meaning that no other person except his heirs may claim it if he dies having not disposed of it by deed, will or otherwise; that B cannot claim as remainderman; that C cannot claim it as reversioner, but that X, Y, and Z, A's heirs, can claim it because it was real estate that belonged to A, whom they succeed. The fee to all privately owned land, must be in some one—the party to whom or to whose heirs it must ultimately come. Thus the lot owned by A,

may be rented to B, or C may have a life estate therein, but A owns the fee. As owner of the fee he may sell it to M, who then becomes the owner of the fee, subject to the briefer estates that may be held therein.

Sec. 50. HISTORY OF THE ESTATE IN FEE SIMPLE. The fee simple estate was originally the estate which was enfeoffed under the feudal system, in return for service or rent to the lord who allotted it, and was distinguished from lands held allodially, that is, without superior.

The term "fee" comes to us from *feudalism,* meaning the same as *feud* or *fief,* which we have heretofore described, being that estate which one had of a superior, and for which he was bound in fealty and must render a service or a rent, which land as we have seen, came ultimately to pass to the feoffee's heirs. But now we simply mean land held absolutely, that land in which one has the highest estate possible in the law—the ultimate ownership.

Sec. 51. WORDS NECESSARY TO CREATE FEE. At common law the word heirs was necessary to create a fee but this has been changed by statute in many states.

By the common law in the creation of a fee simple it was necessary to use the word "heirs." Thus a fee was created by conveying to "A and his heirs," for if one conveyed simply to A, A took a life estate with reversion of the fee to the grantor. By statute this has generally been changed so that a deed to A by one owning the fee vests the ownership of fee in A and the word heirs is not necessary and frequently not used.

Sec. 52. THE RULE IN SHELLEY'S CASE. The rule in Shelley's case was a rule of the common law, still in force in many states, and abolished in others, that if, in any gift or conveyance, a freehold estate was disposed of to a person with remainder to his heirs in fee or in tail, the word "heirs" was used not to give the heirs any estate therein, but to describe the first taker's estate as one in fee or in fee tail as the case might be.

One of the most famous cases in judicial history is that of Shelley's Case,[58] which set forth a rule to be henceforth called by the name of that case ("the Rule in Shelley's Case"), although it had been the rule prior to that time. Suppose that A, by will or deed, gives or transfers property to B with *remainder* to B's "heirs." Now if A had transferred "to B for life with remainder to B's son C," B would take a life estate and C would take the balance of the fee, i. e., C would be the owner of the fee subject to B's life estate. But if the phraseology was to B for life with remainder to B's *heirs,* B would (by the Rule in Shelley's Case) take the entire fee. There are a number of explanations given for this. We have already considered that an estate given to B and his heirs, created a fee simple in B, and the heirs could claim nothing after B's death by virtue of this language, if A in his life time had divested himself by deed or will, or been divested, of the fee. The word "heirs" in that case described, and was necessary to describe, B's estate. Now, if the language is to B, for life, with remainder to B's heirs, the effect, by the operation of the rule in Shelley's Case is to make the legal result the same as though the conveyance or gift had been simply to B and his heirs. B gets the entire estate and the heirs get nothing, save

58. 1 Coke, Rep. 93.

as they may take as B's heirs. B, owning the fee may transfer it and the heirs cannot complain.

The rule is said to be a "rule of property," that being meant to indicate that it will operate even if it defeats the grantor's intention, even if he should say in the instrument that he intended the rule not to operate.

A reason frequently given for the rule is that it is "to obviate the mischief of too frequently putting the inheritance in abeyance or suspense and that it is founded somewhat upon a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the "ancestor [the first taker] than if he continued as a tenant for life [only]."

A case setting forth, at considerable length, the history of, and reasons for the rule, and adopting it, and containing a dissenting opinion which is in favor of getting rid of the rule in Shelley's Case "and other debris from past ages and primitive conditions," is that of Doyle v. Andis, 127 Ia. 36, 102 N. W. 177, 69 L. R. A. 953, to which the reader is referred for extensive discussion. In that case Robert Andis conveyed the land in question to Samuel S. Andis "during his natural life, and then to his heirs." Now this language to one unacquainted with this rule would naturally mean that Samuel Andis got a life estate only. But Samuel Andis, believing that he had the entire fee, purported to convey the same by deed. After Samuel Andis' death, the heirs of Samuel Andis claimed the land asserting that Samuel did not have the fee to convey, but only a life estate, and the deed was therefore inoperative to convey the fee, and that they took under the deed from Robert. But the court held the Rule in Shelley's case gave Samuel the entire fee and that the heirs had no case.

The rule applies both to legal and equitable estates, and whether the transfer was by will or deed.

The rule does not apply unless the word "heirs" is used, at least some synonym therewith. Generally, a conveyance to B for life with remainder to his *children,* would give B a life estate and the children the remainder, which B could not by deed, will, or otherwise, deprive them of, for they have the estate from A and not from B, but merely subject to B's life estate.

By statute in many states (at least twenty-seven) the rule has been abolished, but is in force in many in all its ancient strictness.

Sec. 53. QUALIFIED AND BASE FEE SIMPLES. A qualified or base fee simple is a fee upon condition or subject to a qualification.

It is possible to hold a fee and yet hold it in a qualified or conditional way as where land is granted to A and his heirs as long as they shall continue to occupy it, or so long as A shall remain unmarried. In the latter case, if A never marries, the qualified fee passes into an absolute one, and A's heirs have the fee simple.

Sec. 54. FEE TAILS. A fee tail is an estate which one has under a conveyance or gift to him (the tenant in tail) and a particular class of his heirs. It is not known in this country.

An interesting chapter in the English law of estate is that concerning "fee-tails," which we do not have in this country.

If there was a gift or conveyance to a person and a certain class of his *heirs* (not to him and his heirs generally) as for instance to "John Doe and the heirs male

of his body," this would mean, if effectual, to his lineal male descendants, and so perpetually down that line of descent so long as he should have posterity. But the courts in very early times gave a construction to such gift or conveyance as follows: They determined that such an estate was a gift to John *on condition* that he have male issue, otherwise to revert to the grantor. *If* he did have issue (male in the case supposed) they said that he had *performed* the condition, and therefore took an absolute estate in fee which he could sell; although if he did not sell the same, the land would go to the person or persons coming within the class of heirs designated, or if they had not outlived the first taker (John Doe), would revert to the grantor or his heirs. Therefore, in order to defeat this possibility of reversion, John Doe in the case supposed would sell the land as soon as he had issue, and then would buy it back again and have an estate in fee simple absolute. Thus, by this artificial mode of reasoning the happening of the very condition which would logically vest in the heirs male of his body an estate, was made to defeat it, and the motive underlying such reasoning was to evade the "inconveniences which attended these limited and fettered inheritances." Such limited and fettered inheritances were, however, favored by the nobility and the above construction not favorably received by them and they therefore procured the passage of a statute called the statute *de donis* (concerning gifts) which enacted that the will of the donor should be observed and wiped out the fictitious reasoning above outlined. By virtue of this statute the gift above illustrated (to John Doe and the heirs male of his body) divided the fee into two parts one called a *tenancy in tail* which was John Doe's life estate; the other part of which, the rest of the fee, was to go to the class of heirs named, and on down forever in that class of heirs, subject to

reversion to the donor or his heirs upon failure of such class. This was called *entailment* of estates and took the land out of commerce. It resulted in rendering prevalent many evils, which the courts prior to *de donis* had avoided by the construction described. "Children grew disobedient when they knew they could not be set aside; farmers were ousted of their leases made by tenants in tail; * * * creditors were defrauded of their debts; for if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth; innumerable latent [hidden] entails were produced to deprive purchasers of lands they had fairly bought; * * * and treasons were encouraged; as estates tail were not liable to forfeiture longer than the tenant's life."[59] It would be considered sufficient evil in our day that the land was taken out of commerce. This statute continued in all its force for two centuries, when the courts applied a method of defeating fee tails, and this was by the invention of fictitious suits at law known as *common recoveries,* which Blackstone describes as a kind of pious fraud. And by this process and other development of the law, estates tail were practically made obsolete and the statute *de donis* overcome.

In the creation of an estate tail, the word "heirs" had to be used; the gift being to a certain class of heirs. If to John Doe and after his death to his son William and his heirs, John would have a life estate, and William the fee simple subject to such life estate. To constitute an estate tail there had to be a gift to a *class of heirs,* even though in fact only one person made up that class.

In this country various statutes have been enacted to govern a gift which at common law would have created

59. Blackstone, Book II, p. 116.

an estate tail, as that he who would have been tenant in tail shall have a life estate, the heir in tail taking a fee simple, and some have enacted that language that would have created a fee tail shall give the tenant in tail a fee simple.

CHAPTER 9.

THE LIFE ESTATES OF DOWER AND CURTESY.

Sec. 55. DOWER DEFINED. Dower is a life estate which a widow has in one-third of the lands of which the husband was seized during coverture.

The estate of dower is often misunderstood. Many persons think it to be a portion of the husband's lands which the wife inherits at his death. But this is a misapprehension. Dower is that estate which the wife has in those lands of which the husband was seized during coverture, and that estate is defined by the law to be a life estate in one-third of all such lands. There is no estate of dower unless the wife outlives the husband and if she does outlive him the value of her estate depends on her age at his death. If the husband dies leaving a wife of eighty years of age, the likelihood is that the wife will not long survive and her dower estate is consequently of small value. A dower estate may be perhaps better understood if we liken it to an estate for one year. When the year passes, the estate is gone and the fee is clear thereof. An estate in dower differs from an estate inherited, because the inheritance goes to one absolutely to descend to one's heirs or be disposed of as one chooses. But an estate by dower cannot go to one's heirs because it ceases with one's life; it cannot be willed for the same reason; it cannot be sold except as one may dispose of any life estate. In some states a wife *inherits* real estate under certain conditions (as where there are no children)

and in that case the estate so inherited goes to the wife in fee, as her absolute property, to be disposed of as she sees fit, and to descend to her heirs at her death. Thus in Illinois, if a man dies without children, the wife inherits one-half his real estate; in the other half she has dower. The one-half she may convey in fee by deed; it goes to her heirs upon her death; her estate is worth what the property is worth; though she is ninety years of age she may sell the property at its market value; but her dower is in that case well nigh worthless, for it expires with her.

Dower is of *one-third* the husband's lands. It really amounts to this: that she is entitled to one-third the rents and profits of all his lands during her life; or all the rents and profits of one-third his lands.

Dower is a one-third interest in all the lands of which the husband was seized during *coverture,* that is, all the lands owned by him in fee, to which he had title, or to which he was entitled to possession during marriage. It is, therefore, the practice for a wife to release her dower in land sold by the husband, so that it passes free of this burden, that is, the possibility of her having an estate in it by surviving her husband.

Dower arises as a legal result. Therefore the wife has dower though not named in a deed to her husband. Naming her as a joint grantee would not give her dower but joint or common ownership. Therefore, she would not be named, unless she is to be indeed a co-owner.

Before the husband's death, the wife is said to have *inchoate* dower, that is, possible dower, in case she outlives her husband.

The essentials of dower are: marriage; seisin by husband; death of husband; survival of wife.[60]

60. Id., Book II, 129.

Sec. 56. WAIVER AND BAR OF DOWER. Dower is waived by proper execution and acknowledgment according to local statutes and is barred by divorce of the wife for her fault.

The wife may release her inchoate dower in her husband's lands by joining with him in a sale thereof, and following the provisions of the statute in that regard. In some states she simply joins in the deed and the acknowledgment thereof; in some she must be taken from the presence of the husband and there questioned whether it is her free act and deed. This matter is purely statutory and the state statutes must be consulted.

The laws usually provide also that if the husband divorces the wife (she being in fault), she shall thereby lose her dower.

Sec. 57. ASSIGNMENT OF DOWER. After the husband's death the wife is entitled to have her dower set off to her, or valued and its value paid her.

The wife, after her husband's death, may have assignment of dower. She may have one-third of the land set off to her, or the value of the dower paid her. There are tables of expectancy of life, by which the value of her dower is measured.

Sec. 58. CURTESY DEFINED; ELEMENTS THEREOF. Curtesy is the estate which the husband has for life after his wife's death in all the lands whereof the wife was seized during coverture, provided a child was born by the marriage.

Curtesy was the life estate of a surviving husband in his wife's lands. These were the elements thereof: (1)

Marriage, (2) Birth of child (not necessary to dower); (3) Seisin of lands by the wife; (4) Death of wife; (5) Survival of husband.[61]

Curtesy, like dower, is merely a life estate. By some statutes, curtesy is abolished, and a husband given an estate corresponding to that of the wife.

61. Id., Book II, p. 127.

CHAPTER 10.

CONVENTIONAL LIFE ESTATES.

Sec. 59. DEFINITION. A conventional life estate is an estate created by deed or will, and may be for the tenant's own life or the life of another.

An estate by dower or curtesy is a life estate arising by *operation of law.* Mere ownership by one spouse creates the estate in the other spouse, upon survival of such other spouse, and the owner of the fee cannot defeat dower of curtesy. A *conventional* life estate is one created by deed or will, more frequently by will, as where A gives lands to B for life and after B's death to C. We have already seen that a conveyance or gift to B and his *heirs* does not give B a life estate, but gives the entire estate to B. Also we have seen that under modern law (therein differing from the ancient law) a gift or conveyance to B without use of word heirs gives B the entire estate.

The life estate may be one's own life or for the life of another (*per auter vie*).

A life estate is one that is measured strictly by a person's life. A lease for 99 years, is not a life estate, as it is not coterminous with any life.

Sec. 60. RIGHT OF LIFE TENANT TO ENJOYMENT OF ESTATE. A life tenant has a right to the possession and enjoyment of the estate, but must not permanently diminish it in value, and must give it the care of a prudent owner.

The life tenant may enter upon and enjoy the property in which he has the estate, and is entitled to the rents

and profits thereof. His rights and liabilities are set forth further below.

Sec. 61. LIABILITY FOR WASTE. A tenant for life is liable for waste, unless he holds under a gift or conveyance permitting him to commit waste, and even then, he must not commit malicious or unreasonable waste.

Waste is a word used in real estate law to indicate diminution of value of the estate, or substantial change in its character. If an estate is granted to A for life with remainder to B in fee, it is a very vital question to B how far A may go in his use of the estate or his neglect of it.

Waste is said to be *voluntary* or *permissive*. *Voluntary* waste is waste that is committed by affirmative act by tearing down buildings or cutting down trees. *Permissive* waste is waste permitted by neglect. The tenant for life must be guilty of neither.

What acts constitute voluntary waste? The tenant for life is entitled to the fair use of the estate. He may use what wood he needs out of the timber for fire wood and for necessary repairs, but he cannot clear the timber merely for purposes of gain. However, in the United States, he may cut timber where his purpose is that of good husbandry and his act is in fact good husbandry according to the customs of the community and the actual needs of his estate. This is a question of fact for the jury.[62]

The old common law rule was that to change the character of buildings was waste, even though beneficial to the estate, as the remainderman had the right to have the estate come to him unchanged, but this strict rule has

62. Mooers v. Waite, 3 Wend. (N. Y.) 104.

been modified in the United States, and more liberal views prevail.

Tenants for life are sometimes "unimpeachable for waste" under the terms of the will or deed. In such a case, however, they must not wantonly or maliciously or unreasonably commit waste (as for instance cutting down shade trees), and a court of equity will prevent such waste. Such waste is therefore known as "equitable waste."

The commission of waste may be prevented by injunction and damages for past waste may be obtained.

Sec. 62. RIGHT TO RENTS. Under the common law a life tenant was entitled to rents falling due during his tenancy, but rent falling due thereafter belonged to the remainderman, and could not be apportioned between the two estates.

By the rule of the common law rent was deemed not apportionable. If A were life tenant, and B remainderman, and A died just before rent was due from C, the rent would pass to B, and not to A's executor, and there could be no apportionment between A's estate and B.[63] This rule has been changed in some states which permit apportionment.

Sec. 63. INCREASE IN THE ESTATE. As between life tenant and remainderman, the general rule is increase in substance or value of the estate, belongs to the tenant for life, if it be by way of income, and to the remainderman if it be by way of increase in the corpus.

The life tenant is entitled to income; he is not entitled to the corpus, as he has but a life estate therein. There-

63. Perry v. Aldrich, 13 N. H. 343.

fore, the general rule is that whether he is entitled to any increase depends upon whether it is income or accretion to corpus. Thus he may have the *interest* on bonds, and such interest will be apportioned if he die before it is due,[64] but he is not entitled to increase in the value of the bonds.[65]

As to the right of the tenant to dividends on stock there is some divergence of view. Dividends that are ordinary cash dividends are income and go to a life tenant,[66] but the authorities differ in the case of extraordinary or stock dividends, some holding that stock dividends go to the remainderman and not to the tenant for life (or his executor)[67] and some holding that there should be apportionment of such dividends.[68]

Sec. 64. LIABILITY OF ESTATE OF LIFE TENANT FOR TAXES, ASSESSMENTS, ETC. A life tenant must pay the general taxes and special assessments for temporary improvements, but assessments for permanent improvements are to be distributed equitably between the life estate and the remainder.

General taxes are clearly an expense of upkeep which the life tenant must bear.[69] So, for assessments for temporary improvements.[70] But special assessments for permanent improvements, as for paving, are for the benefit of the remainderman and also the life tenant and ought to be

64. Dexter v. Phillips, 121 Mass. 178.
65. Note, L. R. A. 1915 C. 853.
66. Note, 50 L. R. A. N. S. 514.
67. Gibbons v. Mahon, 136 U. S. 549.
68. Note, 12 L. R. A. N. S. 801; 50 L. R. A. N. S. 515.
69. Huston v. Tribbetts, 171 Ill. 547, 49 N. E. 711, 41 L. R. A. 325.
70. Id.

apportioned.[71] The rules for the division are not in entire accord, one being apportionment on the basis of the respective values, and one on the basis of interest during the life of the life tenant, and principal by the remainderman.[72]

Sec. 65. LIABILITY OF LIFE TENANT FOR INTEREST AND PRINCIPAL OF ENCUMBRANCES. A life tenant must pay the interest on mortgages, but the remainderman must pay the principal.

A tenant for life must obviously pay the interest on encumbrances, for he has the income. But payment of the principal is obviously a deduction from the corpus. Therefore if to preserve the estate the tenant pays a mortgage, he is entitled to be re-imbursed.[73]

71. Id.
72. 10 L. R. A. N. S. 345, note.
73. 29 L. R. A. N. S. 154, note.

CHAPTER II.

ESTATES LESS THAN FREEHOLD—LANDLORD AND TENANT.

Sec. 66. INTRODUCTORY. In this chapter we will consider the estates less than freehold, and that subject involves a consideration of the rights of landlord and tenant.

The estates which are less than freehold usually (though not necessarily) involve the relationship of landlord and tenant, as those terms are used in modern law (for in one sense the owner of any estate in land, including the fee, is a tenant). We will therefore consider some phases of the modern law of landlord and tenant.

Sec. 67. ESTATES LESS THAN FREEHOLD DESCRIBED. The estates less than freehold are those for years, from year to year, and at will or by sufferance.

An estate for years is any estate for a definite period of time as one year or ten years or ninety-nine years. An estate for less than a year if of a definite duration is, technically, an estate for years.

An estate from year to year is an estate running by periods of a year, and is terminable by either party by proper notice at the end of any year. An estate from quarter to quarter or month to month is an estate similar to an estate from year to year. These estates are called *periodic tenancies,* to indicate that they run by periods.

An estate at will is an estate terminable at the will of either party at any time, without any special notice.

An estate at sufferance is an estate by the mere sufferance of the landlord. It is an unusual estate and is very similar to the estate at will, except that it is technically used to indicate certain unusual situations.

Sec. 68. HOW PERIODIC TENANCIES ARE CREATED. Periodic tenancies may be created by agreement or by holding over by the tenant after an estate for years has expired.

A periodic tenancy (e. g., from year to year) may arise from the agreement of the parties that it shall run by periods until terminated by notice. Thus an estate from month to month often arises under an agreement that the tenancy shall be from month to month, that is, not for one month, but indefinitely by the month. But periodic tenancies also arise where the tenant having a tenancy for a certain length of time, *holds over*. In that case he holds by periods according to the period of an original letting. Thus if a tenant for a month holds over he becomes a tenant from month to month. So, if he holds for a year, by holding over, he becomes a tenant for another year, and from year to year.

It is the law that where a tenant *holds over* after his term has expired, the landlord may treat him as a tenant for another like period or may treat him as a trespasser.[74] He must, however, treat him as one or the other, and having made his election he is bound thereby and this election may be shown by act as well as by words. Thus receiving rent or in any way treating the hold-over tenant as a tenant, shows an election upon which the landlord is bound and the tenant may then claim a tenancy for the year.

74. Goldsbrough v. Gable, 140 Ill. 269.

In holding over, the intent of the *tenant* is immaterial. He holds over at the risk of the landlord electing to hold him as tenant for the period ensuing, or a trespasser.

The tenancy thus created goes on upon the same terms as the former tenancy. Thus, if a tenant should hold over and should be recognized as a tenant, the landlord could not raise the rent, any more than he could have done so during the first year.

What is true in respect to holding over in tenancies for a year is true in respect to tenancies for a month.

Periodic tenancies also arise out of tenancies at will, as the tendency of such tenancies is to become periodic, as where one rents a residence for no stated time and afterwards it is by payment of rent or otherwise treated as a periodic tenancy. This would be evidence that it had become such.

Sec. 69. THE CONTRACT OF LETTING—THE WRITTEN LEASE. The letting may be oral or in writing. But oral tenancies for more than one year are not enforceable unless in writing signed by the party sought to be charged. A lease is a written document setting out the fact the letting, and all the terms in reference thereto.

The contract of letting may be oral. If a longer period than one year or if it shall expire more than one year from the date of the making it is within the statute of frauds, and therefore unenforceable unless in writing and signed by the party sought to be charged. But tenancies from year to year are enforceable without any writing.

Where the contract of letting is drawn up in regular form the writing is called a *lease*. See a form in the appendix. This lease states the rent reserved. the terms of the tenancy, etc., and is usually more favorable to the

landlord than to the tenant because provided by and drawn in the interests of the landlord.

The lease, except as we have shown, is not necessary, but desirable, and its provisions constitute the contract.

Sec. 70. THE RENT. Rent is the compensation provided for the use of the premises by the tenant.

The rent is that which is agreed upon as payable by the tenant to the landlord for the use of the premises. It may be in money or produce. Farms are sometimes rented "on shares." Rent is usually stated to be an entire sum for the period, payable in monthly installments. It is usually also payable in advance by the terms of the lease. Otherwise it is not payable in advance.

Sec. 71. DEFENSES TO PAYMENT OF RENT—EVICTION BY LANDLORD. The tenant must pay the rent so long as he occupies the premises as a tenant, even though the landlord is not fulfilling his obligation. But if the tenant is forced to move because of the landlord's default, or is actually ousted from all or a part of the premises, the tenant's obligation to pay rent ceases.

The covenant of the tenant to pay rent is independent of the covenants of the landlord in respect to the care of the premises. The tenant cannot hold back the rent for the landlord's neglect to repair, to furnish the proper amount of heat, etc., so long as the tenant continues to occupy the premises. The tenant's remedy is to make the repairs himself and charge the landlord, or, where he suffers damages attributable to the landlord, to sue for such damages.

Where the tenant is *evicted,* his obligation to pay rent ceases. Eviction is of two sorts, actual and constructive,

and in either case the defense is good. Actual eviction is the actual ouster of the tenant by the landlord from the premises by force. In case the tenant is thus ousted from only a *part* of the premises, he may continue to occupy the rest without any obligation to pay rent or any part thereof. Thus if he rents a flat containing seven rooms and the landlord enters without leave and occupies one of the rooms, the tenant is under no obligation to pay rent until the landlord's occupation ceases. This is actual eviction, and might, of course, extend to the whole of the premises.

Constructive eviction exists where the landlord does an act or pursues a course of conduct which justifies the tenant in leaving the premises and on account of which he does actually leave the premises, as where the landlord is under obligation to furnish heat and fails to do so in sufficient temperature. Here the tenant may abandon the premises on the theory that the landlord has evicted him; but until he does abandon the premises, he cannot refuse to pay rent. As long as one does actually occupy premises he must pay rent, though indeed he might have counterclaims against the landlord. And in leaving the premises, the tenant must be sure that the conduct of the landlord is such as to justify him doing so. In constructive eviction, then, there must be actual abandonment of *all* the premises.[75]

Sec. 72. DUTY OF LANDLORD IN RESPECT TO CONDITION AND CARE OF PREMISES. The landlord is under no duty to furnish the premises fit for any particular purpose; and is under no duty in respect to the care of the premises except as he may have particularly

75. Boreel v. Lawton, 90 N. Y. 293.

undertaken their care; but is responsible for harm from hidden defects of whose existence he knows or should know.

A tenant is presumed to have inspected the premises before he rents them, and therefore cannot complain of their condition in respect to the purposes for which he intends to use them. The landlord does not impliedly warrant them fit for any particular purpose.[76] Of course he may especially do so. So the landlord is under no duty to give the premises any special care.

Where the landlord retains a portion of the premises as he does where he remains in control of the halls, roofs, basements, etc., of apartment houses, he must keep these in such a condition that the rented portions are habitable.[77]

A landlord is liable for damages caused by hidden defects on account of which the tenant is injured, provided the landlord knew, or in the exercise of reasonable care, should have known, of their existence. And he is liable, as we said, to use care in the keeping of such portions of the premises as he may have kept under his control, as halls, etc., which is the case in flat buildings, office buildings and the like.

Sec. 73. DUTY OF THE TENANT IN RESPECT TO CONDITION AND CARE OF PREMISES. The tenant is bound to return the premises in the same condition in which he received them, reasonable wear and tear and causes over which he had no control excepted.

The tenant must use a fair degree of care to keep up the condition of the premises. He need not pay for depreciation caused by reasonable "wear and tear." So,

76. Sunasack v. Morey, 196 Ill. 569.
77. Fairmount Lodge v. Tilton, 122 Ill. Ap. 637.

for destruction of, or injury to, the premises by the elements he is not responsible unless that is his special contract.

Sec. 74. NOTICE REQUIRED TO TERMINATE TENANCY. For tenancies of a fixed period no notice is required. For tenancies from year to year, sixty days' notice is usually necessary before the end of the year. For tenancies from month to month thirty days' notice is necessary. Statutory notices are also provided for termination for non-payment of rent or other defaults.

Where a lease is for a certain period as one year, no notice is necessary by either side for it terminates by its own terms. In a tenancy that runs by periods, the tenancy continues from period to period unless it terminates by sufficient notice. In tenancies from year to year at old common law, a six months' notice had to be given by tenant or landlord, but in some states this has been changed to a shorter period such as sixty days.

Tenancies from month to month are terminable by either party, landlord or tenant, on thirty days' notice.

Periodical tenancies cannot (except upon mutual agreement) be terminated by the notices mentioned except at the end of a period. Thus the thirty days' notice to terminate the tenancy must be thirty days before the day on which the month ends.

Besides these notices there are statutory notices for the purpose of ending any tenancy, periodic or for a certain term, at any time when the rent is unpaid when due, or any covenant unperformed by the tenant; such as five day notices. These statutory notices are for use where the tenant has been guilty of some breach, for which the landlord desires to terminate the tenancy. Such breaches may of course be waived by the landlord and

when once waived, cannot afterwards be asserted. Thus, the failure to pay rent when due is a nominal breach; the landlord by afterwards receiving rent when tendered would thereby waive the breach.

Sec. 75. EFFECT OF DESTRUCTION OF PREMISES ON TENANCY. The common law rule was that destruction of the premises by fire or other casualty did not abate the rent or terminate the tenancy if there was anything left to which the tenancy might attach.

Suppose that premises are destroyed by fire—must the tenant continue to pay rent? Is the tenancy thereby destroyed? The common law rule still in force in most jurisdictions is that in the absence of any provision in the lease, the tenancy does not terminate, and the rent does not diminish or abate if there is anything left to which the tenancy may attach, for instance if the tenancy is of the ground and the buildings on it,[78] but if merely of the building or a portion thereof, its entire destruction will relieve him.[79]

78. McMillan v. Solomon, 42 Ala. 356.
79. Wait v. O'Neil, 76 Fed. 408, 34 L. R. A. 550.

CHAPTER 12.

ESTATES IN REMAINDER AND REVERSION, AND EXECUTORY DEVISES.

Sec. 76. ESTATES IN REMAINDER; TWO SORTS. Remainders are the parts of the fee that remain out after the termination of a particular estate and are of two kinds—vested and contingent.

Where the fee is granted to begin at the end of another estate granted at the same time, the fee is said to be divided into two parts called the "particular estate" and the "remainder" of the fee. Thus, if A grants an estate to B for life and then to C and his heirs, B's estate is known as a particular estate and C's estate is known as the remainder because it commences after the termination of the particular estate and does not come back to the grantor. If in this case A had granted to B for life, making no disposition of the fee after B's death the estate would come back to A and his heirs and A's interest would be known as the "reversion."

At common law a fee could not be granted to take effect in the future. There had to be livery of seizin. But this did not prevent the creation of remainder to begin after the termination of a particular estate because it was considered that the particular estate and the remainder together made up the fee and as the tenant of the particular estate could take the seizin at once the rule in reference to livery of seizin was satisfied. Subsequently by various devices and direct legislation to that effect the

fee could be conveyed *in futuro,* but a division of the fee in this case is still known as a remainder.

Remainders are known as "vested" and "contingent."

Sec. 77. THE VESTED REMAINDER. A vested remainder is one, the right to enjoy which (after the termination of the particular estate) has already become certain.

A vested remainder is one which the remainderman has already acquired, though because of the particular estate, he has as yet no enjoyment thereof. Thus a grant by A to B for life and after B's death to C and his heirs, C being at that time alive, *vests* an estate in C as much as in B, though B has the present enjoyment. Yet C owns the fee and C is the one from whom title must come to any purchaser thereof. It is true C may not live to enjoy his estate. But so is it true that one who has leased his land to another for any term, however short, may die before the tenancy ends, yet he is no less the owner thereof. So in any state of remainder, the remainderman in fee is the owner thereof though his possession may be delayed beyond his death. But remember that in all cases of vested remainders, the estate must really have *vested.* The person to take must have come into existence and there must not be any condition which may defeat title.

A remainder may vest at the time of the grant or gift, or thereafter on the happening of a contingency.

Sec. 78. THE CONTINGENT REMAINDER. A remainder is contingent when it is not certain that it will ever vest in the remainderman or his heirs.

A contingent remainder is one which may never vest. The contingency happening, it may become a vested re-

mainder. A remainder may be contingent for a number of reasons. The remainderman named may not yet be in existence and his coming into existence is therefore a contingency on which the vesting depends, as where an estate is granted to A for life and then in fee to the unborn eldest son of A, otherwise to B and his heirs. Or it may be contingent because though the remainderman is in existence, some event may transpire to keep him from ever coming into the enjoyment thereof, as where a particular estate is granted to B and then over to C in the event that he has a son.

Sec. 79. THE PARTICULAR ESTATE. A particular estate is necessary to the creation of a remainder, and in contingent remainders must be a freehold estate.

To have a remainder there must be a particular estate upon which the remainder is supported and the remainder must begin immediately upon the termination of the particular estate. Thus, a grant by A to B is a mere conveyance of the fee in its entirety and there is no outstanding remainder. So a grant from A to B to begin *in futuro* is a mere conveyance of a future estate and no remainder (a future conveyance of the fee was not possible at common law). To support a contingent remainder a particular estate of freehold was necessary.

Sec. 80. OF THE VESTING OF REMAINDERS. The law favors the vesting of estates, and a remainder will vest as soon as possible. Where the remainder is to a class, the estate vests in the members of the class as they come into being subject to being opened up for subsequent members.

It is the policy of the law that estates should vest at the earliest possible moment. For this reason where there

is any doubt as to whether a remainder is contingent or vested, the court will construe it as a vested remainder. For this reason also an estate will be considered as having vested at the earliest possible moment. Where the gift is to a class none of the members of which are yet in existence, but who come into existence during the life of the particular estate, the remainder will vest in each member as he comes into being subject to being opened up for possible future members.

Sec. 81. THE RULE AGAINST PERPETUITIES. The rule against perpetuities is a rule which forbids the postponement of the vesting of an estate beyond a certain period. Estates must vest during a life or lives in being or twenty-one years thereafter.

The law forbids the tying up of an estate by remote contingencies whereby it may vest upon their event. The policy of the law in this respect is expressed in what is termed the "rule against perpetuities." This rule has no application to *vested* estates. Thus a gift to A of an estate which is subject to a lease for 999 years would be good and the rule against perpetuities would not apply to it. The rule is, that if a grant is made to take effect upon a *contingency* the gift is void unless the contingency *must* occur and the estate thereby *vest* either during the life of the tenant, or lives of the tenants, named, or within twenty-one years after his or their death. This permits a gift to an unborn son of the living tenant to take effect on his 21st birthday.

Sec. 82. ESTATES IN REVERSION. Where an estate less than the fee is created, the fee, subject to this estate

remains in the grantor or testator, his heirs or assigns, and is an interest known as the reversion.

By the term reversion we indicate the title which one has in property when he has granted an estate to another which is less than the fee and has not disposed of that fee by way of remainder. Thus, if A owns land in fee and rents it for ninety-nine years to B, the reversion is said to be in A who is the owner of the fee after the ninety-nine years have elapsed. He may sell this reversion or dispose of it as he will but it must pass of course subject to the rights of the tenant.

Sec. 83. EXECUTORY DEVISES. An executory devise is a gift of real estate by will to take effect on a future contingency without the intervention of a particular state.

An executory devise is, as the name implies, a gift of real estate by will, to take effect upon some future contingency, as where "one devises land to a *femme sole* and her heirs upon her day of marriage";[80] an executory devise needs no particular estate to support it, as in the illustration given, and at common law the same gift by deed would have been void as a conveyance of the fee *in futuro*. But by executory devise this was permitted.

It was also said that one by executory devise could "limit a fee upon a fee" which was not permissible by deed as "if a man devises land to A and his heirs; but if he dies before the age of twenty-one, then to B and his heirs."

The executory devise is void if it is contrary to the rule against perpetuities.

80. Blackstone, Book II, p. 173.

CHAPTER 13.

SEVERAL AND JOINT OWNERSHIP OF ESTATES.

Sec. 84. INTRODUCTORY. Titles may be held jointly by a number of persons or by one person in severalty.

We have been considering how an estate may be in fee or for life or for a term of years, etc., without respect to the person who may own it. We now see that any of these estates may be owned by one person or by several together. Where several own together there are technical distinctions to be made.

Sec. 85. THE ESTATE IN SEVERALTY. An estate in severalty is an estate owned by one person to the exclusion of all others.

Where the title is in one person he is said to own in severalty. Thus, if A owns a life estate or a term of years or a fee, he owns in severalty. This simply means he is a sole owner but does not exclude the idea that he may have created a lesser estate; for instance, owning in fee, he may lease for a term. Here he would be owner in severalty subject to a tenancy.

Sec. 86. TENANCIES IN COMMON. An estate is held in common when there is an undivided ownership by several persons who hold by several and distinct titles.

The ordinary case of plurality of ownership in modern days, is that of tenancy in common. A tenancy in common

is a tenancy by several who hold distinct titles to the whole estate, their interests being undivided, as where A, B, C, and D, children of X, deceased, inherit his land. Here each owns the *entire* estate in common with the others. So if two parties purchase property jointly taking a title in the name of both, they are owners in common.

Where land is held in common, each of the tenants in common may have a partition when he so desires (provided of course there is no express restriction of that right in the particular case), that is to say, any tenant in common may demand a division of the estate according to his interest and if this is refused the court will make this division upon suit being filed to that end. Where the land is of such a nature that it cannot be partitioned without manifest injury to the property or the interest of the tenants it will be ordered sold and the proceeds divided.

Tenants in common need not hold in equal interest. Thus one tenant might have one-half interest and two others each a one-fourth interest. So one may hold by descent, another by deed, another by will, etc. A tenant in common may sell his interest or dispose of it in any way he sees fit and his successor has the same rights in the land that he had. Upon the death of a tenant in common his interest passes to his heirs or to his devisees. In this it differs from an interest by joint tenancy, which on the death of the tenant passes to his survivor.

Sec. 87. JOINT TENANCIES. A joint tenancy is a tenancy held by two or more by the same title in the same interest.

A joint tenancy was a common law estate where several persons came by grant or devise (deed or will) into an ownership of the same estate. Thus, if A granted to B

and C for life or in fee, B and C were joint tenants. A joint tenant could not compel a division and when he died his interest passed to his survivor. Joint tenancies are now generally abolished, except where expressly created, and except in cases of trustees and the like, where survivorship of title is desirable. The language which would have once created a joint estate now creates an estate in common.

Sec. 88. ESTATES IN CO-PARCENARY. An estate in co-parcenary exists where several persons hold as one heir.

An estate in co-parcenary was an old common law estate existing where several took the same land by inheritance. Thus there being no eldest son, the daughters inherited in co-parcenary, and also by the custom of gavel kind in Kent, all the sons inherited together. To-day such parties hold in common.

Sec. 89. ESTATES IN ENTIRETY. Estates in entirety were estates held by husband and wife.

Where an estate was given to a husband and wife, the title was known as a title in entirety, as they held as one person. This estate has become unknown in our modern law and now husband and wife hold either as tenants in common or joint tenants. Of course, either the husband or wife may own property in severalty subject to the dower of the other one.

CHAPTER 14.

ESTATES OWNED LEGALLY OR EQUITABLY—USES AND TRUSTS.

Sec. 90. IN GENERAL. The law permits one person to hold legal title to property upon obligations to use it in declared ways for the benefit of another, that is, one may have the legal title, while another has a beneficial estate therein.[81]

In our law, it is possible to clothe one with legal title, upon declared uses or trusts for the benefit of another; the legal ownership is in one and an equitable ownership or claim in another. Thus we may have A granting the fee to B subject however to a provision that B shall use the land for C's benefit and to convey it to C after a certain period. We speak of obligations of this sort as uses and trusts. There are a variety of reasons why an estate might be granted in this way; to keep it intact for a period instead of being divided among several; to give the legal title into capable hands, the beneficiary being a spendthrift or inexperienced; to perpetuate certain purposes, etc. Uses and trusts may also arise by operation of the law.

The owner of the legal title is called the trustee, the person for whose benefit he holds it is called a beneficiary or a *cestui que trust*.

Sec. 91. A USE DEFINED. A use may be defined as a right to the benefits and profits of land the legal title to which (or in early days the seizin of which) was in another.[81]

81. See Historical discussion in Blackstone, Book II, p. 327 and following.

The term "use" was once of more importance than now, as we shall see. We now generally use the term "trust." A use was a right in one to the benefits of land of which another had the title.

The idea of a use was probably taken from the German law, and was originally applied in England to give the benefit and profits of land to a religious order forbidden by law to hold real property. Thus if A desired to convey to a church and the church was forbidden to hold real property, A would convey to B "to the use" of the church, setting out the uses. Courts of equity took jurisdiction of uses and enforced them. The law which forbade the ownership of lands by the church was called the "Statute of Mortmain," to prevent excessive holdings "in dead hand," and this statute was evaded by the adoption of the use and its recognition by courts of equity. Other purposes of the use were soon found, and it was created to unjustly evade the liabilities and burdens incident to ownership.

Sec. 92. THE STATUTE OF USES. The statute of uses was a statute passed to prevent holding land upon use, by putting the legal title in the beneficiary. The courts decided that certain uses were not covered by the statute and these survived under the name of trusts.

Owing to the evils possible under the device of the use, Parliament in 1535, passed the "Statute of Uses." It provided that whenever a person should be seized to uses, the person having the use should by operation of law be deemed to have the seizin or legal title.

The courts in course of time decided that the statute did not execute:

(1) A use upon a use.
(2) Uses in personal property.

(3) Active uses.

To distinguish what uses it did not execute, the court called them "trusts."

First, as to a use upon a use. Here A conveys to B to the use of C to the use of D. The courts of law declared the title in C by virtue of the statute and the use to D void, as there could be no use upon a use; but courts of equity enforced the use to D as a trust. Thus C would hold to the use of or in trust for D, notwithstanding the statute. Thus by a few words the court permitted the evasion of the statute, and the very condition existed which the statute was enacted to prevent.

Second, uses in chattels. Uses in chattels were not covered by the statute. Such uses were known as trusts.

Third, active uses. An active use is one in which the feofee to uses has active duties to perform as where he must collect rents, or perform services of any sort. Other uses were known as *passive* or *dry* uses in which the feofee to use held the bare naked title with no duty to perform except when demanded or at a certain period to convey the fee to the beneficiary.

Sec. 93. CONVEYANCES UNDER THE STATUTE OF USES. The statute of uses was availed of by the conveyancers to transfer the title without livery of seizin.

We have elsewhere noticed that in transfers of the fee there must be "livery of seizin" at common law. Under the Statute of Uses, a number of forms of conveyance were invented which did away with this necessity and also permitted the transfer of the fee *in futuro.* This was accomplished by creating such a use as the statute would execute. Thus A desiring to convey the fee to B *covenanted to stand seized* to B's use. The statute of uses thereupon operated to give B the seizin and B with-

out more ado became vested with the seizin and the ownership. This was the "covenant to stand seized," but it afterwards fell into disuse in favor of the "lease and release" and the "bargain and sale." Thus conveyancers made use of the Statute of Uses in ways not contemplated by the enacters, and by its aid the fee could be granted without livery of seizin.

Sec. 94. TRUSTS DEFINED AND TABULATED. A trust may be defined as an obligation upon the legal owner of land to hold or use it for the benefit of another upon uses not executed by the statute of uses; or it may be used as synonymous with the term use.

From our discussion of a use, we understand already what we mean by the term trust which is the modern term and indicates a common situation.

Trusts may be tabulated as follows:

(1) Express trusts.
  1. Active trusts.
  2. Passive or dry trusts (either so in their creation or by performance).

(2) Implied trusts (or trusts that arise by operation of law.
  1. Constructive trusts.
  2. Resulting trusts.

An express trust is one created by the language of a deed, will or other instrument. If there are active duties to perform, as to manage the property, collect rents, etc., it is called an active trust. A passive trust is one in which the trustee has nothing to do except convey the legal title to the beneficiary. If so in its inception, and concerns real estate it is properly a use and not a trust, and the statute of uses immediately by operation of law

executes the legal title in the beneficiary. Or it may become passive because all the duties thereunder have been performed, except the conveyance of the legal title.

Implied trusts are such as arise by operation of law in order to give the real ownership to one who in equity ought to have it instead of the nominal holder of the title.

Sec. 95. THE CREATION AND EVIDENCE OF THE TRUST. The trust may be created by deed, will, or contract, and if in real property cannot be enforced unless declared in writing by the party legally capable of declaring it; except resulting and constructive trusts.

Trusts may be created by almost any form of declaration. They are perhaps most frequently declared in wills. They may be declared by deed or any form of agreement.

Trusts in real property must be *declared* in writing, except constructive and resulting trusts. They need not be *created* in writing so long as a declaration follows. In that case the trust will be enforced from the time created. The form of declaration is immaterial so long as sufficient in substance. It may be found in letters, pleadings in litigated cases, etc. Usually of course, it is declared when created, as in wills, deeds, and the like.

The declaration must be by the one who can impress a trust upon the property, that is, the owner. Thus A conveys to B declaring the trusts. Or he conveys to B on trust but omitting the written declaration, depending on B's integrity. Now B is the only one who may declare the trust.

The declaration must be signed.

In every trust there must be certainty. The property affected must be certain, the person to be benefited must be certain, the use must be certain, though a discretion

in the trustee is permissible; and there must be a trustee named or described and capable of identification.

Trusts cannot be created to offend the rule against perpetuities. The trust cannot be a perpetual one. There must be a vesting of the estate within the time provided in that rule. This, however, does not apply to *charitable* trusts, which may be perpetual.

Sec. 96. PRECATORY TRUSTS. A precatory trust is a trust inferred from the use of words of hope, confidence and the like.

A precatory trust is sometimes said to be an implied trust, but it is really an express trust, because it is expressed in the words used, though not directly and clearly. Thus suppose A leaves property by will to B "having full trust and confidence" that B will devote to certain uses for C's benefit. Has it been conveyed upon trust in the sense that B *must* perform the trust, or is that a matter left to his own discretion or sense of right? The rule is that where words of hope, desire, confidence, etc., are used in this way there must really be an intent manifest from all the instrument to create a positive trust. The language though consisting in pleading or prayerful words, must be mandatory, and it must contain all of the elements of a trust, as certainty of party, certainty of property affected, certainty of purpose, etc.

Sec. 97. CHARITABLE TRUSTS. A charitable trust is a trust for the benefit of the public at large or of some class of persons of the public.

A charitable trust is also called a public trust. It is a gift made in a charitable purpose to the public, or to some class of the public. as a gift to maintain a home

for crippled children, to found a hospital, to endow a chair in a college not conducted for private profit, etc.[82] A charitable trust differs from a private trust in perhaps three ways:

(1). The objects of the trust must be members of a class. The gift cannot be for the benefit of John, Henry or William (for then it would be a private trust), but for the benefit of a class in which John, Henry and William are to be found.

(2). The rule against perpetuities does not apply. A charitable trust may be in perpetuity.

(3). A doctrine called the *cy pres* doctrine applies. By this doctrine the court will not allow a charitable trust to fail because it is incapable of literal execution. If the particular object fails, the court looks to find the general intent of the donor and then applies the trust as nearly as may be to the object of the donor.

In other ways a court treats a charitable trust in a different fashion from a private one. Such trusts are encouraged and favored by the law. So, if a trustee has not been named in a charitable trust the court will appoint one.

It has been held that a gift to maintain a drinking fountain for horses is a charity. But trusts to maintain a private burial lot are not charitable, and therefore must not be made in perpetuity.

Whether a trust is private or charitable is important under inheritance tax laws, in respect to exemption from tax.

82. By statute 43 Eliz., C. 4 various purposes of charitable trusts were enumerated. This statute is usually regarded as illustrative and not exhaustive.

Sec. 98. THE TRUSTEE, HIS TITLE, DUTY, ETC. The trustee has the legal title, and must perform the trust, in its letter and spirit, and manage the estate in a prudent and profitable manner. He must look first to the safety of the investments made by him and secondly to the income.

A person named as trustee need not accept the trust. In case he does not desire to accept, he should for his own protection make an immediate and unequivocal rejection. But if he undertakes to act, he must act as a prudent man. He is not protected in merely acting in good faith. He must not undertake the trust if he is incapable of performing it with prudence. He must make repairs, keep up insurance, etc., and do all things that a prudent man would do in managing his own property. Where the trust consists in funds to be invested, the first requisite is safety of investment. To this end the courts have said that a trustee must invest in such securities as first mortgages on real estate, government bonds, etc. Some statutes make an extension of this and allow a trustee to invest in municipal bonds, corporation bonds, etc., where a reasonably prudent man would regard them as safe. Of course, if the trust directs the investment *in a particular way* the trustee must act in that way.

The profit from the trust fund is of second consideration. That must be made as large as possible *compatible with safety of the investment.*

Sec. 99. SPENDTHRIFT TRUSTS. A spendthrift trust is a trust which provides that the beneficiary cannot by assignment or otherwise impair the trust fund or income and that creditors shall have no recourse to the fund or income. If of public record it is in most jurisdictions upheld as valid.

A spendthrift trust, as above described, is for the purpose of preventing waste of the funds or income by

an irresponsible beneficiary. In most jurisdictions it is regarded as valid,[83] largely on the theory that creditors take a risk when dealing with a person in such a situation. After the beneficiary actually gets his income, then it loses its character as a trust fund and creditors may attack it or the beneficiary may spend it as he chooses.

One cannot convey his own property to a trustee upon a spendthrift trust in his *own* favor. He cannot thus place his own property beyond the reach of his creditors.

Sec. 100. IMPLIED TRUSTS. Implied trusts are trusts raised by the law on account of the equities of the circumstances. They are of two sorts; resulting and constructive.

Where one is in the ownership of property which from the circumstances evidently in equity belongs to another, the law raises a trust so that the legal title may be made to come to him who is the real owner. There are two sorts —resulting and constructive.

Sec. 101. RESULTING TRUSTS. A resulting trust is one which arises under circumstances from which it appears that one who becomes clothed with the legal title was not meant by the parties to have the beneficial title thereto though no trust has been declared.

We will find that constructive trusts are trusts which arise largely out of circumstances which are fraudulent or in the law amount to fraud. A resulting trust is one in which the parties have entered into some transaction by which one becomes clothed with the legal title but it is evident from the circumstances that he is not to have the beneficial title. One class of cases is that in which pur-

83. Wagner v. Wagner, 244 Ill. 101.

chase money is paid by one person and the title taken in the name of another. Here the law presumes a trust unless it affirmatively appears that a gift was intended. Another class of cases is that in which a trust is made upon purposes which thereafter fail or upon purposes which are to be announced later but are not announced.[84] There are also some other classes of cases but these are the chief ones in which a trust results.

Sec. 102. CONSTRUCTIVE TRUSTS. A constructive trust arises where there is fraud or inequitable conduct by which one comes into the legal ownership of property which he does not otherwise possess.

Where one acquires a title through fraudulent conduct or through inequitable conduct, the court may impress the title with a trust in favor of the real owner or person who ought to be the real owner. The circumstances are multitudinous. Thus, where property is about to be conveyed in trust and a third person induces the donor not to name the trust but convey to him and he will perform the trust, as where A being about to make a will in B's favor is induced by C to convey to him upon his representation that he will convey to B.

So where an agent takes title in his own name; so where trust funds are used by the trustee for investments of his own. In these and many other cases the court impresses the property with a trust.

84. Trapnall v. Brown, 19 Ark. 39.

CHAPTER 15.

ABSOLUTE AND CONDITIONAL ESTATES.

Sec. 103. IN GENERAL. Estates may be held in absolute title, or upon a condition that may defeat them.

One may convey an estate absolutely or upon condition. A condition may be *precedent,* keeping an estate from vesting, or, it may be a condition *subsequent* which defeats a vested estate. A condition precedent is one which prevents any ownership accruing at all, as where an estate is to pass to one provided she marries. Thus, all contingent remainders are estates depending on conditions that may prevent them from ever vesting.

We shall notice an estate upon condition in the case of a mortgage which of old (and even now in form), was an estate subject to defeat by the payment of the mortgage debt, but by failure thereof, passing into an absolute estate.

So we shall notice other estates upon conditions as to the *use of the land.*

CHAPTER 16.

ESTATES IN MORTGAGE.

A. The Nature and History of the Mortgage.

Sec. 104. MORTGAGE DEFINED. EARLY VIEW AND HISTORY. A real estate mortgage at common law was a conveyance of the legal title subject to a condition subsequent that the mortgagor might revest the title in himself by paying a debt or performing other obligation at a time stated. The courts of equity permitted redemption notwithstanding breach of condition.

(1) Common law view of mortgage.

A common law mortgage was a deed to property conveying the fee to the mortgagee; subject, however, to a condition that the title should revest in the mortgagor upon his performance of an obligation therein stated. This condition had to be literally performed in order to entitle the mortgagor to his former estate. The condition was usually of course to pay a debt which matured on a certain day. If the day passed without the condition being performed or tendered, the title thereafter became absolute. The time for the condition having elapsed, it could not be performed.

The courts of law enforced these provisions of the mortgage literally.

The day on which the condition was to be performed came to be called the "law day," the day on which in the law court the title became absolute.

(2) Equity of redemption.

The result of the strict enforcement of a mortgage was of great harshness to the mortgagor. He would thereby lose his estate through his inability to pay, notwithstanding it might be many times more valuable than the indebtedness. The mortgagee would thereby obtain the repayment of his debt many times over and become unjustly enriched by a loan of money on which he never took any risk. It may be said that the mortgagor should never make such a bargain and if he did it was his own folly, but this overlooks the fact that the terms of a loan cannot be dictated by a necessitous borrower. Courts of equity disfavor harsh penalties and forfeitures. They therefore permitted a mortgagor after condition broken to file a bill for redemption of his estate upon his payment of the debt. Under the common law view the transaction was what it literally purported to be—a conveyance on condition. But courts of equity, looking beyond the form saw that the transaction was really one of *indebtedness,* with the conveyance as security. The mortgagor did not go to the mortgagee to *sell* his property. He went to *borrow money.* The amount of money he got was not an agreed purchase price; it was simply money borrowed, perhaps much less than the property was salable for. The injustice of enforcing the mortgage in its strict literalness to cut the mortgagor off by his nonpayment on the law day led to the relief stated. From the fact that a mortgagor had this relief in equity, his estate came to be called his "equity," or "equity of redemption"—words which we use today, although his interest is now the legal title.

(3) Foreclosure of equity.

The fact that the court would entertain a bill for redemption by the mortgagor, laid a cloud on the mort-

gagee's title after the law day passed. He could not alienate for there was ever the possibility that the mortgagor might redeem. Hence in case the mortgagor did not redeem, the mortgagee appealed to the court to *compel* him to redeem, or be forever *barred and foreclosed* of his equity of redemption. The court would therefore enter a decree giving the mortgagor a specified time in which to redeem, otherwise to be barred of his right to redeem. By this process, the mortgagee's title became absolute.

It will be noticed that by this foreclosure proceeding the mortgagor lost his estate, as completely as under the legal theory, and the mortgagee became entitled thereto regardless of the excess value over the debt unless the mortgagor redeemed within the time granted by the court. In other words, the court did not work out its equitable view to its logical and just conclusion. It remained for that to be done by future development of the equitable idea.[85]

Sec. 105. MODERN VIEWS OF A MORTGAGE. The modern view of a mortgage is that it is a conveyance in security for a debt, the debt being the main thing and the mortgage merely incidental thereto.

In modern days we regard the mortgage as a lien though in form it is still a conditional conveyance conveying the fee, but for practical purposes it is merely a lien by which one secures payment of his debt and no more. The debt is regarded as the main thing and the conveyance a mere shadow thereof without existence apart from the debt.[86] When foreclosure is had, the mortgagor is not barred but a public sale is conducted and

85. See Pomeroy, Chapter Fifth.
86. Lightcap v. Bradley, 186 Ill. 510.

the debt paid out of the proceeds, the surplus being rendered to the mortgagor after deduction of the proper expenses incidental to the sale. Where the mortgagee is still regarded as having legal title, he has it only for the limited purpose of his security. The mortgagor as to all the world has the legal title. He can convey, subject to the mortgage and his wife has dower in the equity.

B. The Creation of the Mortgage.

Sec. 106. THE FORM OF A MORTGAGE DEED. The deed or mortgage is in form a conditional conveyance of the fee.

By reference to the form in the appendix the modern form of a mortgage deed may be seen. The fee is conveyed upon a condition.

Sec. 107. TRUST DEEDS. The trust deed is a form of mortgage in which a trustee is appointed and it has some advantages over the other form.

A trust deed is set out in the appendix and should be studied. It is in reality for all purposes merely a mortgage. A trustee is appointed who holds the property in trust subject to the terms of the deed. In some states this trustee is given a power of sale and he is the person who releases to the mortgagor when the deed is paid. A trust deed is for many purposes preferable. One reason is that a trust company of reliability may be appointed trustee and thus is excluded the danger of change of trustee by death; another reason is that the debt may be more easily transferred, the notes being simply indorsed in blank by the debtor and circulated among succeeding

purchasers of the debt while in the case of a mortgage, an assignment thereof would be desirable.

Sec. 108. THE EVIDENCE OF THE DEBT. The evidence of the debt is usually in the shape of promissory notes of a negotiable character.

When a mortgage is made there are two instruments to be executed; first, the mortgage or trust deed itself; and secondly, the notes which express the indebtedness. There may be one note or there may be a series of notes and the note may have interest coupons attached or simply bear interest. It is often preferable to make the note payable to one's self and then indorsed in blank.

Sec. 109. EQUITABLE AND CONSTRUCTIVE MORTGAGES. Where the transaction is in reality a mortgage a court of equity will so construe it and enforce it even though its character is not apparent upon its face.

Applying the maxim that a court of equity looks beyond the form and into the substance of a transaction, a court will enforce a transaction as a mortgage where it was the intent of the parties that a mortgage would exist though the form of the transaction seems to indicate an absolute deed or other transaction. Thus if one borrows money and to secure the mortgage makes a deed to the lender upon an oral agreement that the lender will reconvey when the debt is paid, this is in reality a mortgage, though it does not so appear upon the face of the instrument, and if the grantor in the deed can show that the transaction was really a mortgage the court will give him redemption of the property.[87]

87. Helm v. Boyd, 124 Ill. 370, 16 N. E. 85.

C. Provisions in Mortgage Deeds.

Sec. 110. THE POWER OF SALE IN MORTGAGES AND TRUST DEEDS. The mortgage or trust deed usually contains a power of sale whereby the mortgagee or trustee can foreclose the mortgage except in some states where mortgages must be foreclosed in the courts.

If the law permits, the mortgage or trust deed contains a power of sale by virtue of which the mortgagee can foreclose the mortgage without going into court, by simply having a public sale, paying the debt out of the proceeds and rendering the surplus to the debtor.

In some states it is provided by the law that all mortgages of real estate must be foreclosed by a judicial proceeding and in such a case a power of sale would of course be nugatory. Consequently, in these states no power of sale is contained in the forms used.

Sec. 111. ATTEMPTED WAIVER OF THE RIGHT OF REDEMPTION. The right of redemption cannot be waived by the parties to the contract.

As soon as the court came to the assistance of the mortgagee to give him redemption after the law day, the attempt was made by lenders to secure back the advantage thus taken away. By express contract it may be provided that there should be no right of redemption, but the courts have held that if a transaction is a mortgage then the incidents of a mortgage will exist irrespective of the agreement of the parties. The phrase in this connection has often been used "once a mortgage, always a mortgage" and this means that once the court has decided the transaction is a mortgage it will treat it as such for all purposes and the parties cannot deprive the mortgage of its nature

by the addition of a few words. Since borrowers will in their necessities, often consent to anything, the lender could get back the old harsh remedy of forfeiture for nonpayment if the courts did not take this attitude.

Sec. 112. RECORDING LAWS CONCERNING MORTGAGES AND TRUST DEEDS. Recording laws are in effect in all states by which the creditor can perfect his lien against all the world by making proper record of the mortgage or trust deed.

Between the parties the mortgage is good without record and it is also good as to third parties who have notice, but it is the desire of one who has notes secured by mortgage to know that his security is good against the whole world. This he may accomplish by recording the mortgage in the place where the real estate is situated. Every party thereafter who desires to deal in respect to that real estate or acquire any rights against it must take notice of what the record is, which as a matter of fact, he may secure by examining an abstract brought down to date. Thus, if a mortgage is properly put on record, subsequent judgment creditors of the mortgagor take a secondary lien; the subsequent mortgagees of the same property likewise take a junior lien, and purchasers of the land take subject to the mortgage.

Sec. 113. POSSESSION BY MORTGAGEE. If a mortgagee takes possession, this gives notice to all the world of whatever rights he may have.

It is customary to always record a mortgage whether the mortgagor remains in possession, which he usually does, or whether the mortgagee goes into possession. But it is still the law, if the mortgagee does take possession,

this possession is a notice to everybody that he has rights in the property and will protect him against subsequent purchasers and encumbrancers.

D. Incidents of a Mortgage.

Sec. 114. RIGHT OF POSSESSION. The right of possession is in the mortgagor unless agreed otherwise though by the common law it was in the mortgagee.

Who shall have the right of possession depends upon the contract of the parties but if there is no express provision in the contract the mortgagor has the right of possession until breach occurs on his part. By the common law the mortgagee had a right of possession but now in most of the states the mortgagor has this right and cannot be deprived of it at least until breach.

Sec. 115. DUTIES OF THE PARTIES. The duty of the mortgagor is not to impair the value of the property. The duty of the mortgagee in possession is to treat the property as a prudent owner.

The general duty of the mortgagor is not to decrease the value of the security by pulling down buildings or other acts of destruction, though he can hardly be said to have any duty to keep the place at its original value. When a mortgagee goes into possession he must give that care to the land that a prudent owner would give. He must see that it is insured, that taxes are paid, etc., though he may add expenses of this sort to the debt. He also must allow a reasonable rental for the value of the premises while in his possession to go to reduce the debt, and whatever rents and profits there may be from the land he is not entitled to except in payment of the debt.

E. Sale of the Mortgaged Property and Transfer of the Debt.

Sec. 116. SALE SUBJECT TO DEBT. A sale of premises by the mortgagor cannot deprive the mortgagee of his lien if the mortgage is properly recorded, but as between the mortgagor and the buyer, the buyer may or may not assume the debt as a part of the consideration.

We have seen that if the mortgagee properly protects himself, his lien is good against the whole world and that if the mortgagor sells the property the buyer must take subject to the lien of the mortgage.

Where land which is sold is subject to a mortgage the mortgage is generally assumed by the buyer, for this is the best way he can protect himself, because otherwise he must rely upon the financial ability of the mortgagor to pay the debt when due, and the buyer in that case runs the risk of having to pay the debt twice, once to the mortgagor and then to the mortgagee to prevent foreclosure. Accordingly it is the usual rule for the buyer to assume the payment of the mortgage paying the difference in value to the mortgagor. Thus, if land worth ten thousand dollars is mortgaged for five thousand a buyer pays five thousand and assumes the debt. In such a case he is said to be buying the "equity," though he is in reality buying the legal title subject to the mortgage.

Where the buyer assumes the payment of the debt he becomes the principal debtor and the original mortgagor becomes the surety. In such a case, both mortgagor and purchaser can be held liable for a deficiency of the security upon foreclosure.

Sec. 117. TRANSFER OF THE DEBT. The mortgagee may transfer the debt and in that case the security is also transferred as an incident thereto.

Just as the mortgagor may sell the land subject to the debt, so the mortgagee or holder of the trust deed notes may transfer the debt. As the mortgage is an incident of the debt and has no existence apart from it, the right to the mortgage cannot be assigned independently of the debt and always passes as an incident of the debt.

The usual manner of assigning the debt is as follows: If the mortgage is in the mortgage form the notes are transferred and the mortgage assigned usually by a separate deed of assignment. If the mortgage is in the form of a trust deed the notes are simply transferred. Very often the notes are made payable to the order of the maker and then indorsed by him in blank, and in that event may be transferred by the mere delivery of the notes. This makes the transfer of the debt very simple.

F. The Remedies of the Mortgagee.

Sec. 118. INJUNCTION TO PREVENT WASTE. The mortgagee may have an injunction to prevent waste by a mortgagor in possession.

Where a mortgagor is in possession of the property we have seen that it is his duty not to commit waste and he may be prevented by an injunction.

Sec. 119. EJECTMENT OF THE MORTGAGOR. The mortgagee could at common law eject the mortgagor and take possession, but in the United States the mortgagor's right to ejection depends upon the right of possession, and we have seen that the mortgagor has the right of possession until condition broken and in some states has it at all events except upon a contract to the contrary.

Where the mortgagee does eject the mortgagor he does it merely for the purpose of satisfying the debt and when

the debt is gone the mortgagee has a right to the premises again. Ejectment in such cases is not common as the mortgagee resorts to foreclosure.

Sec. 120. SUIT ON THE DEBT. The mortgagee may sue upon the notes or upon the debt in whatever form it is.

A mortgagee has a claim which is secured by mortgage. He need not resort to the mortgage for his remedy but may have a judgment in a common law court upon the debt and by virtue of his judgment can take out execution on the property of the debtor, but not the property included in the mortgage, for this would give him foreclosure in a manner not contemplated by law.

Sec. 121. FORECLOSURE. The ordinary remedy of a mortgagee is that of foreclosure.

At common law this meant the barring of the mortgagor's equity of redemption and under modern statutes means the sale of the property through judicial proceedings or at a non-judicial sale, in states where that is allowed, for the purpose of satisfying the debt and paying a mortgagor the surplus. Where a mortgagor fails to pay the debt when it is due and the mortgagee finds that he must pursue some remedy to obtain satisfaction the usual remedy is that of making use of his security and is done by means of foreclosure.

In the event that he does not thus secure satisfaction of his debt, the mortgagor still owes him the balance.

By statute a mortgagee may have in a foreclosure proceeding a "deficiency decree" to cover the deficiency, if any results, in the foreclosure sale.

Sec. 122. KINDS OF FORECLOSURE. At common law foreclosure was by judicial proceeding to bar the equity of redemption. Under the modern practice it is either by judicial proceeding to sell the property and pay the debt out of the proceeds or to sell at a non-judicial sale under a power of sale in the mortgage.

(1) *Foreclosure at Common Law.* Foreclosure in early days as we have already indicated meant the taking of the estate mortgaged through a judicial proceeding whereby the equity of redemption was cut off after giving the mortgagor a certain time within which to redeem. By this method the mortgagor was given a chance to get his estate back but upon failure to comply with the terms of the decree the mortgagee obtained the property as his own though it might have been of a value largely in excess of the debt.

(2) *Under Power of Sale in Modern Practice.* It is the practice in some states to put in a mortgage or trust deed a power of sale whereby the mortgagee or trustee is given the authority to sell the property at public or private sale and pay the debt from the proceeds, rendering the surplus to the mortgagor after payment of costs and accrued interest. In almost every state the old common law remedy of strict foreclosure is abolished.

(3) *Foreclosure Through Judicial Proceedings Under Modern Practice.* Where there is no power of sale in the mortgage the foreclosure must be through judicial proceedings and in some states powers of sale are not legal and in that case it must be foreclosed in the courts. The courts of equity foreclose a mortgage these days by ordering a sale of the property by a master in chancery or other judicial officer at which the best amount obtainable is secured by auction, out of the proceeds of which the mortgagee is paid his debt and expenses and the

surplus then turned over to the mortgagor. Strict foreclosure as it existed in early times whereby the estate itself was taken is not now permitted as a general rule and never permitted where the security is of more value than the debt. From this sale the mortgagor has a certain time to make a redemption and this we consider in the section 124.

G. The Remedies of the Mortgagor.

Sec. 123. REDEMPTION FROM THE MORTGAGE. The mortgagor may redeem from the mortgage by applying to a court of equity offering to pay the debt with accrued interest and costs.

We have already seen how after the law day had passed the mortgagor was permitted by the courts of equity to get back his estate notwithstanding his breach of the condition, by paying the debt. This was called redemption and the mortgagor's right was known as his "equity of redemption." Ordinarily it is not necessary in these days for a mortgagor to apply to a court of equity for this remedy for the simple reason that if he can pay the debt the mortgagee is willing to receive it and to release the title without any court intervention. If, however, the mortgagee is unwilling to accord the mortgagor his rights then the mortgagor has the remedy named. A bill for redemption is accordingly brought where there is no bill for foreclosure. This is the way also that a mortgagor proceeds when he has given an absolute deed which he now claims to have been by way of mortgage.

This right of redemption from the mortgage must be strictly distinguished from the right of redemption from a sale in the foreclosure proceeding given by statute and which we consider in the next section.

Sec. 124. REDEMPTION FROM SALE. Where the mortgagee forecloses by means of a judicial or non-judicial sale the mortgagor has the right of redeeming his property from the sale for a certain period of time by paying the debt with a rate of interest provided by law and perhaps a certain penalty.

There is a right of redemption given by the statute where there has been foreclosure. This redemption is entirely distinct from the one named in the last section because that is resorted to when the mortgagee will not recognize the mortgagor's equity of redemption. The redemption we now notice is a statutory one provided in cases of foreclosure whereby after the sale the mortgagor has a certain length of time in which to pay the debt and get back his property from the purchaser at the sale. Thus, suppose that A, mortgagee, forecloses against B, mortgagor, and C purchases at a sale decreed by the court. The sale brings three thousand dollars more than the debt and all costs, accrued interest, etc. This surplus is turned over to B. Now C obtains a certificate showing that he has purchased the property and that in course of time he will be entitled to a deed if B does not redeem. The statute, however, gives B twelve months, say, in which to redeem from the sale and B can avail himself of this right and thereby secure back his estate by paying to C all that C has paid out with interest thereupon.

H. Junior Mortgages.

Sec. 125. RIGHTS OF SUBSEQUENT MORTGAGEES. Assuming that a mortgagee has protected his security by record or otherwise, subsequent mortgagees take a lien which is subject to the first mortgage, each in order of time.

Sometimes junior mortgages are given upon land. This is really a mortgaging of the equity of redemption and

those subsequent mortgages cannot in any way affect the rights of the first mortgagee, assuming that the first mortgagee properly protects himself by record or taking possession. To illustrate the effect of a second mortgage, let us assume that A has mortgaged his property, worth ten thousand dollars, to B for five thousand dollars. Here A has an equity worth five thousand dollars. A then again mortgages the property to C for two thousand dollars. Suppose now that B forecloses. The property is sold without any lien upon it on account of C's mortgage, because otherwise A could prejudice B's rights by subsequently putting a lien upon the property in favor of C and at a sale the property would have to be sold subject to C's lien which would mean that less cash would be offered for it. What, then, are C's rights? They are practically to pay the first mortgage when it is due (if A will not do so) and step into B's place, having in that case a lien upon A's property for $7,000.00; or C may redeem in A's place for he is subrogated to this right. A junior mortgagee then has his protection in being able to take care of the first mortgage if the mortgagor does not do so, the security being ample to cover both mortgages.

PART V.

BOUNDARIES; AND RIGHTS IN ANOTHER'S LANDS.

CHAPTER 17.

BOUNDARIES AND RIPARIAN RIGHTS

Sec. 126. IN GENERAL.

The inquiry to be made here is as to the ***territorial extent*** of ownership, i. e., what are the boundaries of the land. There may be, in any particular case, no difficulty, unless it be merely of survey, as where John Smith's property lies contiguous to and is bounded by Henry Jones' property. But in case there is a road, river or lake, between the two, or Smith's property lies along the lake shore, where is the boundary deemed to be? The answer is the subject matter of this chapter. *Description of boundaries* is covered in Chapter 27, *post*.

Sec. 127. LAND BOUNDED BY HIGHWAYS. Land bounded by a highway extends to the center thereof, subject to the public's use, unless under the law the ownership is in the public.

The law of Highways is largely a matter of local law, but the general rules so far as they effect boundaries may be stated here.

The fee of a highway may be in the Public or in the adjoining owners. If in the adjoining owners, each owns

to the center of the highway, subject to the right of the public to use the highway. If, however, the state or city owns the fee, the adjoining property extends of course only to such road or street. In some states dedication of a street by the owner or owners puts the fee in the public, while under other statutes or practices the fee remains in the owners subject to the use of the public.

If the fee to a highway is in the adjoining owners, it is a presumption, subject to rebuttal, that a conveyance of the property carries with it the title to the center of the roadway, and a description of the land only, without mentioning the street will carry with it the title to the street.

Sec. 128. LAND BOUNDED BY RIVERS. By the common law if land is bounded by a navigable river the title to the bed of the river is in the sovereign and the adjoining owner owns to the high water mark, but if the stream is non-navigable, the adjoining owner owns to the thread of the stream. The terms navigable and non-navigable described respectively streams in which the tide did or did not ebb and flow. This rule is still adhered to in some states, but not in others.

In order to determine whether a person owned to the middle of a stream or merely to the shore, it is necessary by the common law rule to establish whether the stream is navigable or non-navigable, but those adjectives had a special meaning to convey in the one case that the influence of the tide was felt, in the other, that it was not. Navigability in fact did not make the stream navigable within this rule. The tide must be felt therein.

If within this rule, a stream is non-navigable (whether navigable in fact), the adjoining owner owns to the

thread of the stream, and owns any islands or parts of islands on his side of the thread of the stream, subject to the easement of the public in the water; but if navigable he owns to the high water mark only, the bed of the river being in the sovereign, and the land between high water and low water mark being a public common.[88]

In some jurisdictions the question of navigability is one of *actual fact,* and this will determine whether the boundary stops with the shore or goes to the edge of the stream.

If the owner owns to the thread of the stream a conveyance by him of the land will carry title to the thread of the stream unless reservation is made.

The stream, if navigable in *fact,* whether navigable in law or not by the above test, is subject to a public easement, that is, the right of the public to navigate it and make reasonable uses thereof, including the right to temporarily tie up at the wharves thereof, or to seek shelter upon the shores.

Although the owner of the adjoining land may own also to the thread of the stream, he owns subject to the public easement, and also subject to the rights of others, whose property abuts upon the stream. He must therefore make no use of it that will pollute it, or unreasonably diminish it or stop or impede its natural flow. In other words, his use of it must be a reasonable one.

Sec. 129. LANDS BOUNDED BY LAKES. If a lake is navigable, generally the title is in the sovereign. If not

88. Middleton v. Pritchard, 4 Ill. 510. (This case held that the Mississippi River adjoining the Illinois shore, to be non-navigable by the common law test and that the owner of the land on the river owned title to trees on an island on his side of the thread of the river and that defendant was liable to him in damages for cutting and carrying them away.)

navigable the adjoining owners own the bed of the lake in proportion to their water frontage.

There is a good deal of confusion in the cases as to the rules to apply in case of lands bounded by lakes. The English common law was about the same in case of lakes as in case of rivers, as stated in the above section. But America has problems which England did not have on account of the number and size of the lakes in this country. We can perhaps with accuracy lay down the general rule that if a lake is large enough to be navigable *in fact,* the bed of the lake belongs to the sovereign subject to the riparian rights of the owners of the adjoining shores, but if not navigable in fact the owners own the lake bed. But it has been held that if the lake is *meandered* in making the original survey, the title passes to the water's edge, but if not large enough to be meandered then title passes to the bed of the lake as the boundary of the adjoining land.[89]

A meander line is a line drawn by the surveyors along the shore from point to point following the general outline of the lake, and does not in itself constitute the boundary.

If the bed of the lake is in the adjoining owners, it may be a difficult task to assign to each his proportionate part. On account of the fact that the lake is circular in form, and there is no thread of the stream, lines of the adjoining boundaries cannot be extended, as in the case of rivers. Different tests have been suggested generally to the effect that the adjoining owner owns that portion of the lake which is proportionate to his water frontage.

89. Fuller v. Shedd, 161 Ill. 462; see note to Gouverneur v. National Ice Co., 18 L. R. A. 695, for conflicting authorities on question of title to bed of lake.

CHAPTER 18.

PROPRIETARY RIGHTS IN THE LAND OF ANOTHER.

A. Easements and Profits.

Sec. 130. EASEMENTS DEFINED. An easement may be defined as a right which a person has by grant or prescription to have a certain enjoyment or use in land of another in which he has no estate of possession.

By the term easement we convey the idea that one person possesses land and another person out of the possession has the right to make a certain use of the land, as to have a roadway or path over it or else to have the owner refrain from making a use of it. It is to be regarded as a permanent interest; interests of a temporary character by mere permission are called "licenses."

Sec. 131. KINDS AND ELEMENTS OF EASEMENTS. Easements are either positive or negative, appendant or in gross.

The first division of easements may be made into those which are positive and those which are negative. A positive easement is a right which one has to do something upon the land of another, as to go across it, to flood it with water, etc. A negative easement is the right to compel the owner to refrain from making a certain use of it, thus the right which one has to have light and air

over the land of another is a negative easement. Easements of light and air in this country can arise only by express grant and not by prescription as in England.

Easements are also divided into those which are appendant and those which are in gross. An appendant easement is one which goes with an estate irrespective of the ownership and exists in favor of that estate over a neighboring estate. The benefited estate is called the "dominant estate," and the burdened estate is called the "servient estate." An easement in gross is one possessed by a certain person irrespective of his ownership of any estate. It is purely personal and cannot be assigned.[91] Easements in gross are uncommon.

Sec. 132. ACQUISITION OF EASEMENTS. Easements may be acquired by grant or by prescription.

An easement may arise in the first place by agreement as where it is contained in a deed or any form of grant, or it may arise by long continued usage, in which case we say that it arises by "prescription." To acquire an easement by prescription there must be a claim of the right continued for twenty years and the enjoyment of the easement must be continuous and adverse, that is, claimed as a right and not as a mere favor, and must be open and notorious.

An easement sometimes is said to arise not by express grant or by prescription but *impliedly* from the circumstances. The chief implied easement is an "easement of necessity," existing where land is granted with no outlet except over the land of the grantor. As long as this condition of affairs continues an easement of necessity

91. Knecken v. Voltz, 110 Ill. 264.

exists. But no easement can ever so arise over the land of a stranger.[92]

We see herein how an easement differs from a license. An easement is claimed as of right—an estate irrevocable and vested, the enjoyment of which, when the right is established, the court will protect, as any other estate, while a license exists by consent of, or contract with, the recognized owner, not in opposition to the owner's estate, but by his consent.

Sec. 133. INCREASE OF BURDEN. The owner of the easement must use it only for the purposes for which it was granted or acquired. He cannot change or increase the burden.

The easement must be used for the purposes acquired. It cannot be turned to other purposes.

Sec. 134. TRANSFER OF EASEMENTS. Easements may be transferred by the transfer of the land involved.

We have seen that easements are called appendant when they are in favor of one estate, called the dominant estate, against another estate, called the servient estate, and that being incidental to the use of the land may pass with a transfer of the land without any express statement in that respect, although the deed sometimes does provide that all easements, ways, etc., are to pass with the grant. Appendant easements cannot be separated from the estate and therefore cannot be transferred independently of it.

Sec. 135. HOW EASEMENTS ARE LOST. Easements are lost through abandonment, by express release and by change of condition making them necessary.

92. Collins v. Prentiss, 15 Conn. 39.

A person having an easement may abandon it. We cannot say that a mere disuse of an easement is an abandonment of it but it would be evidence thereof. An easement may be relinquished by express agreement. So by change of circumstances the easement may become no longer of necessity or convenience and thereby be lost, as where buildings are torn down, etc., or where a roadway is opened up to which there is convenient access, etc.

Sec. 136. PROFITS Á PRENDRE. A profit á prendre is a right to substance of another's land as the right to take coal, wood, fish or turf.

An easement is a mere right to *use* the land of another for some purpose. But there may be a right to *take something* from the land of another. These rights are not common in this day, but in English history a peasant or land-holder might have the right to go upon the land of his lord and take wood, coal, etc., and this right was called a "Profit á prendre," or a Common. There were four chief sorts of commons; first, common of estovers, or the right to take fuel; commons of pasture, or the right to pasture one's cattle; commons of turbary or the right to take turf; commons of piscary or the right to fish. These commons were acquired by grant or prescription and perhaps we need not examine them more at length.[93]

B. Right to Lateral Support.

Sec. 137. STATEMENT OF THE RIGHT. Every owner of land, has the right to have it supported in its natural state

93. See Blackstone's Com.

by the adjoining land or by artificial supports supplied in place thereof.

It is a natural right that land owned by one person should not have the support of the adjoining land withdrawn, unless some substitute support is put in its stead. But this right applies only to land in its natural state. A, cannot place the burden on B, of the support of the buildings erected on A's lands. It may be said therefore that buildings on a person's lands must have their own sufficient foundations. In Transportation Co. v. Chicago,[94] the court said: "The general rule may be admitted that every land owner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But this right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did, it would put it within the power of a lot owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot."

Sec. 138. DUTY IN MAKING EXCAVATIONS. An owner who excavates his land, must take reasonable care not to cause damages to the adjoining land or buildings thereon and must notify the neighbor of his intention to excavate.

It follows from the last section that an owner may excavate his land without any liability unless he take from the adjoining land its support in its natural condition. However, this does not mean that he can cause damage to the neighboring buildings that might have been reasonably

94. 99 U. S. 635 at p. 645.

avoided. City of Quincy v. Jones, 76 Ill. 231. For this reason it is held that he must use due care in making such excavations, and must give notice of his intentions so that the owner of the adjoining building may take such precautions as are necessary.[95]

95. Davis v. Summerfield, 131 N. C. 352.

PART VI.

OF THE ACQUIREMENT OF TITLE EXCEPT BY DEED, WILL, AND DESCENT.

CHAPTER 19.

VARIOUS WAYS OF ACQUIRING TITLE OTHER THAN BY DEED, WILL, OR DESCENT.

A. Title by Prescription and Adverse Possession.

Sec. 139. IN GENERAL. A title to real property may be acquired by long continued occupation of an adverse character.

One may acquire title to real estate by a possession adverse to that of the owner.

Also under some statutes an adverse title may be acquired without possession where it is under color of title, and the lands are of unimproved character.

Sec. 140. THE PERIOD OF LIMITATION. The common law period of limitation was twenty years. But by statute shorter periods may avail under specified circumstances.

To acquire title by adverse possession at common law there had to be (1) actual possession (2) of an adverse character (3) continuously and (4) for twenty years. This is also generally the law today.

But statutes have provided shorter periods of adverse

acquisition where there are other elements present, such as possession *and payment of taxes* for, say, seven years, or possession for seven years *under color of title*. The law of each state will manifestly have to be consulted on these additions to the common law of adverse claim.

Sec. 141. WHAT CONSTITUTES ADVERSE POSSESSION. The possession to be adverse must be an actual possession which need not consist in residence upon the property but must be of some use which would notify the world at large that this person is in possession of the property.

The possession required must be a possession which is not merely constructive but actual. This does not mean, however, that the person claiming the land must live upon it, for if he fences it or farms it or in any way uses it constantly so that the public would be apprized that he was in possession, this would be considered adverse, provided it is really of an adverse character, that is, under a claim of right.

Sec. 142. TACKING SUCCESSIVE INTERESTS. Parties who claim in adverse possession may make out the period of limitation by tacking the possession of several together provided their possessions were continuous and their claims in privity.

It is not required that the same person remain for twenty years in adverse possession but his purchasers and heirs or devisees may complete the adverse possession by continuing to hold it adversely. There can be no tacking of the interests of parties where they hold without privity of title. In the cases we have just mentioned there would be privity of title, but suppose that A holds for ten years and then abandons the possession and B

takes it up and continues it for ten years more. Here B could not claim title by reason of A's prior ten years possession, for the holdings cannot be tacked together, being of an independent character.

B. Title by Escheat and Forfeiture.

Sec. 143. MEANING OF ESCHEAT AND FORFEITURE. An estate was forfeited to the king for various reasons. It is said to escheat when there is no heir. There is no such thing as forfeiture of estate in this country.

Where a person had committed certain crimes he forfeited his estate as a portion of his punishment. In this country we have no such thing as forfeiture of property to the state for punishment for crime, but it remains in the person and he may dispose of it by will and at his death without a will it goes to his heirs. Escheat is a term meant to describe the forfeiture of the title to the King or over-lord where there were no heirs. One might be deprived of heirs by a "corruption of his blood," as it was called, where he had committed a crime or there might be no heirs simply because he died without kin. In this country there is no such thing as corruption of blood and therefore no escheat for that reason, yet of course a man may die without heirs and the law must in that case provide some disposition of his property. In such a case it goes to the state or county.

It is contrary to the policy of the law to take an estate for lack of heirs, unless this becomes necessary. We see in another connection, that there is no failure of heirs until not only those in direct line, but collateral relatives fail.

C. Title by Accretion.

Sec. 144. TITLE BY ACCRETION DEFINED. Title by accretion is the title that a riparian owner acquires by gradual additions to his lands by the action of the water.

One who has land bounded by water may acquire title by *accretion*, or lose it by *erosion*. These words mean the gradual addition or subtraction of the riparian land by the action of the water in adding to or wearing away the shore. Such changes may add to land on one side of the water and take land from the other, changing the thread of the stream, and the extent of the land of the respective owners grows or diminishes accordingly.

The sudden breaking away of a perceptible body of land is said to be "avulsion," and it is said that the owner can claim the same unless he allows it to remain contiguous to other land until it becomes attached thereto.[96]

Sec. 145. DIVISION OF ACCRETIONS. The rule generally applied in the apportionment of accretions is set out below.

In Kehr v. Snyder,[97] the court says:

"'Measure the entire river front of survey 759 as it existed in 1860, when the third division of Cahokia commons was first laid out,' and note the aggregate number of feet frontage, as well as that of each parcel or lot; then measure a line drawn as near as may be with the middle thread of so much of the stream as lies opposite the shore line so measured. Having done this divide the

96. Missouri v. Nebraska, 196 U. S. 23.
97. 114 Ill. 313, at p. 317.

thread line thus measured in as many equal parts as there are lineal feet in the shore line giving to each proprietor as many of these parts as his property measures feet on the shore line; then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and the river lines."

PART VII.

OF TITLE BY DEED.

CHAPTER 20.

THE CAPACITY OF PARTIES TO GRANT AND TO RECEIVE BY DEED.

Sec. 146. CORPORATIONS. A corporation has the general capacity to receive and to grant real estate.

The powers of a corporation depend upon its charter and as far as the state is concerned a corporation may not have a right to hold an excessive amount of real estate and can be compelled to dispose of the same. But almost every corporation has the power to own some real estate whether that is mentioned in the charter or not because that is a power which is incidental to its other powers. If it has *any* power to hold real estate it may take a good title to any real estate and give a good title to any real estate whether as far as the state is concerned it has a strict right to hold it or not. A purchaser of real estate from a corporation is therefore usually not concerned whether it has a right to hold the particular estate in question or not as he takes a good title if it has any power whatever to hold real estate.[98]

98. See title Corporations in this Series.

Sec. 147. ALIENS. Aliens may as a general rule under the statutes sell or buy real estate to the same extent that citizens may but some statutes give the state a right to compel an alien to sell his real estate after he has held it for a certain number of years.

We may say that an alien may buy and sell real estate almost as freely as a citizen. Some states protect themselves against possible large holdings by an alien by statutes to the effect that after a period of years an alien may be compelled to dispose of the property at the suit of the state and thus convert his property into personal property.

Sec. 148. MINORS. A minor may take and receive real estate but his deeds are voidable by him upon becoming of age.

A person under legal age is called an infant or a minor. He may be a grantee in a deed and also may sell his property but after becoming of age he may have the deed set aside provided he acts within a reasonable time.[99]

Sec. 149. INSANE PERSONS. An insane person has, generally speaking, no power to grant real estate though he may take a title by deed.

An insane person's contracts are either void or voidable and he has no capacity to make deeds of a binding character. It is possible of course that an insane person shall have property deeded to him. He has the capacity to receive real estate.

99. See Volume I, of this Series as to contracts and deeds of minors.

Sec. 150. MARRIED WOMEN. **A married woman at common law was incapacitated to make contracts but modern statutes have given her as full power to grant and to receive real estate as a married man has.**

A woman's capacity to contract was taken from her at common law. There were indeed ways worked out by the conveyancers whereby title to her real estate might pass from her. By our modern laws in respect to married women, she has power to receive and grant real estate. The husband has, of course, an inchoate right of curtesy or dower in her real estate, so that he must join in her deed to convey an unclouded title; but a married man's conveyances are also subject to similar considerations.

CHAPTER 21.

OF THE VARIOUS CLASSES OF DEEDS.

Sec. 151. THE ANCIENT ENGLISH DEEDS. The ancient English deeds were the original deeds of feofment, gift, grant, lease, exchange and partition; and the derivative deeds of release, confirmation, surrender, assignment and defeasance.

We will examine the ancient English deeds very briefly in this section. The time was when the subject of conveyancing was much more complex than at present as our times tend towards simplicity in such matters. Deeds were formerly executed upon parchment, sometimes in counterpart and sometimes singly. Where the deed was executed by both parties the counterparts were written upon the same parchment, which was then cut into in an irregular fashion so that each part fitted the other and this form of deed was called an "indenture" because of the indented edge, and we have this word until this day in legal instruments which begin, "This Indenture Witnesseth," although the indenting itself has long since been abolished. Deeds which were not indented were called "deeds poll," meaning that they were "polled" or "shaved" even and not indented.

Old English deeds may be known as those which are *original* and those which are *derivative* or which in some way affect an original deed.

A deed of feofment was the deed whereby the fee was conveyed *in praesenti* and to this deed *livery of seisin*

was a necessary ceremony to convey the fee; that is, there must be a present *delivery of possession* in order to transfer the fee. Land could not be enfeofed to take effect in the future. The fee could only be transferred by present transfer accomplished by actual *livery of seisin.*

The deed of gift was a technical name given to a deed whereby an estate tail was granted; it was similar to the deed of feofment, and livery of seisin was likewise essential.

The deed of grant was a deed whereby all estates were granted of which in the nature of the case there could be no livery of seisin, as in the case of a grant of the reversion. But if livery of seisin *could* be had the deed must be one of feofment with livery of seisin.

A deed of lease was a deed for life or years or any less time than the lessor had in the premises; and was the same deed in effect that our lease is today.

A deed of exchange is a deed whereby the parties mutually exchange estates.

A deed of partition is a deed whereby both tenants or tenants in common or copartners agree to divide the land among them each taking a distinct part.

Coming now to the *derivative deeds,* the first of these was the *release* whereby one who has an estate in land releases his estate to the other as where the owner of the fee releases his interest to the tenant. In order for a release to operate at common law it was necessary for the relessee to be in possession.

The deed of confirmation was a deed given to correct or confirm a former deed.

A deed of surrender was the opposite of a release, as where one who has an estate surrenders it to another who has a higher estate.

An assignment was a transfer of a right in an estate as where one lessee assigns his estate to another.

A deed of defeasance was a collateral deed containing conditions upon the performance of which an estate might be defeated

Sec. 152. THE DEEDS MADE UPON THE STATUTE OF USES. Under the statute of uses, conveyancers, invented forms of deeds which took effect by the language of that statute because they created uses which that statute executed and in this manner livery of seisin was avoided in the conveyance of a fee. They were the deeds of bargains and sale, lease and release and covenants to stand seized.

We have already noticed the statute of uses and we need not occupy space to examine at length the deeds mentioned for they are not in common use today. We know that the statute of uses was passed to give the fee to him who before that time had a mere use in an estate, the bare legal title to which was held in another. Thus if A conveyed to B for the use of C, the statute of uses gave the legal title to C. Under this statute a number of deeds were invented by which uses were created and the statute then operated to convey the fee, and this saved livery of seisin. The *lease and release* was a form of conveyance whereby a lease was given to one as for a year and then released to the lessee. The *bargain and sale* was a deed whereby the grantor bargained to sell and by his bargain became a trustee for the grantee and the statute of uses then conveyed the estate to the grantee. A covenant to stand seized was the creation of a use which the statute executed in the covenantee. In all of these deeds a use was created which the statute executed. We need not examine them further. Blackstone treats them fully if any further study is sought.[100]

100. Book II, p. 327ff.

Sec. 153. PRESENT DAY DEEDS. The present day deeds are warranty deeds, trust deeds and mortgages, release deeds, leases, and assignments.

(1) Warranty deeds.

A warranty deed is a deed used today whereby the grantor warrants the title to the property, that is, he contracts that if the grantee loses the title, or suffers any damage by reason of any defect in it he, the grantor, will make him whole. There are several warranties of title, such as the grantor is the owner and has the right to convey and that there are no encumbrances and that he will give further assurance and defend the title. By statute in many states whereby certain words are used, as "grants and conveys" or as "bargains and sells" certain warranties of title will be implied; and forms of warranty deeds are set out in the statutes with the legal effect that they shall have. A warranty deed is said to convey after acquired title. Thus, if A by warranty deed conveys to B and the title is defective and A afterwards acquires any title it passes to B under the former warranty deed. In all sales of real estate for an agreed price the warranty deed is the usual deed.

(2) Quitclaim deeds.

The quitclaim deed is a deed used when it is desired that anyone who may have some claim upon land should convey it but the grantor does not care to make any warranties. By a quitclaim deed one in effect says "I hereby quit my claim to this land." Where one is thought to have any interest which operates as a cloud on the title he is usually asked to quitclaim, but would hardly care to warrant in such a case. So when several tenants in

common desire to convey to one of their number a quitclaim deed may be used. A quitclaim deed is as effectual to pass a legal title as a warranty deed but no warranties are contained in it and the grantor merely parts with what, if anything, he has, without warranting that he has any interest whatever.

(3) Other deeds.

Trust deeds and mortgages we have already considered.

Leases are deeds by which tenancies are created and we have already considered them.

A release deed is a deed whereby one who has an interest in property under some other deed, releases it. It is used by a mortgagee to release title to the mortgagor and by a trustee to release title obtained by him under the trust deed. The release deed always refers to the deed by which the title which is now released was obtained. Thus a trustee when the debt is paid releases whatever interest he may have by virtue of the trust deed, describing it by date and record number. See the form in the back of this book.

The deed of assignment is a deed whereby one estate is assigned to another as where a mortgagee assigns the mortgage to another. Where a lease is assigned it is usually done by a short assignment on the back of the lease.

CHAPTER 22.

THE PARTS AND ESSENTIALS TO DEEDS.

Sec. 154. FORMAL PARTS. A deed has certain orderly and formal parts but is now of a simpler nature than it used to be.

A deed is said to have these following parts: first, the *premises,* which sets forth the number and names of parties and the consideration and also the description of the property conveyed;[101] second, the *habendum and tenendum.* The *habendum* states the quantity of the estate; and the *tenendum* was formerly used to signify the tenure, but as now there is but one form of tenure, the *tenendum* is useless and is seldom used. Where we use the words "to have and to hold" today they simply read somewhat as follows: "To have and to hold to himself and his heirs forever." But an examination of the modern deed will show that these ancient provisions which used to extend at length are no longer necessary; though of course the deed must show the estate granted, whether, for instance, for life or in fee. The next part of the deed in old days was the *reddendum* or reservation of rent and this part of a deed we do not find in modern deeds except in leases. Another part of the deed is that which states the conditions upon which the estate is granted, and these are not usually put in deeds, except mortgages and trust deeds, though the fee is sometimes

101. See Sec. 214, *post,* for description of real estate.

made defeasible, as we shall notice further. The next part of the deed is that part containing the warranties but in our modern deeds the warranties are usually implied in the words used and are not made extensively and are contained in such words as "grant, bargain and sell," etc., at the beginning of the deed. The next part of the deed is that in which the *covenants* are made in reference to the use of the property, etc., and we will find that land is often granted upon covenants as to its use in our day as well as ancient days. Next comes the *conclusions* which contains the date of the deed, and refers to its execution. After this is the signature and the seal.

A brief reference to the modern form of deed will show how simple it has become.

Sec. 155. THE EXECUTION OF THE DEED. By the execution of the deed we mean the act of making it complete as a deed, by signature and sealing in its completed form. The deed is executed by signature and seal with the intent of making it complete and final, but, also, there must be delivery of it before it takes effect.

Sec. 156. DELIVERY. The deed has no effect without delivery and delivery consists in parting with the deed with the intent of releasing all control over it and making it effective as a legal document.

A deed must not only be properly signed and sealed but it must be delivered before it can take effect. A person may have a deed in his possession which is fully signed and complete in form but the grantee therein can claim nothing by it until it has been delivered to him or to someone for him. The reason of this is very apparent. One may make a deed before he really makes up his mind

to use it and until he finally hands it over it can have no effect.

The lack of delivery frequently renders inoperative deeds evidently intended to be effectual at death, but never given over by the grantor during his life time to the grantee.

Delivery may be absolute or upon condition and when upon condition it is said to be delivery *in escrow.* The party to whom it is delivered is called the escrowee and it is his duty to deliver it to the grantee upon the performance of a condition, as for instance, payment of certain money. Thus, when property is purchased the deed is often put up in escrow to be delivered on payment of a certain part of the purchase money. The deed cannot be delivered in escrow to the grantee himself.

Sec. 157. ACKNOWLEDGMENT. Acknowledgment is the act of the grantor before some official in admitting the instrument to be his own for the purposes therein set forth. It is not essential as between the parties but is requisite to entitle the deed to record, and for other purposes.

Before the grantor delivers the deed he generally acknowledges the same before a notary public or other officer and this consists in his admission, that the deed is his own and was given freely and for the purposes set forth in the deed.

A deed may be effective between the parties without acknowledgment provided it was really delivered, but acknowledgment is always desirable and is necessary for certain purposes. In the first place a trumped up charge of fraud on the part of the grantor would be more difficult to sustain. In the second place, acknowledgment is necessary in most states to make the recording of the deed

effectual against third parties. In the third place, dower and homestead cannot be waived by deed except it is acknowledged and in the fourth place, a deed which is acknowledged is said to prove itself, meaning that it can go in as evidence without proof of its execution which would otherwise be necessary.

Sec. 158. ACCEPTANCE. Acceptance is also necessary to the effect of a deed but in the case of children, insane persons and the like it will be presumed.

It is said that acceptance is as necessary as delivery and that is true in this sense, that you cannot compel a man to take an estate against his will, but of course acceptance is usually one with the delivery and does not consist in any special formality. Children who are of tender age, lunatics and the like are *presumed* to have accepted and can take the estate though too weak mentally to signify a willingness to receive it.

Sec. 159. RECORDING. The record of the deed is not essential to its validity in any sense but is necessary for the grantee's protection against subsequent acts of the grantor and should never be neglected.

The purpose of recording the deed is to give notice to all the world of the grantee's rights thereunder and for this reason the grantee should always record the deed for in that only, can he be sure of protection against the acts of the grantor with innocent persons who still rely upon his ownership of the title having no notice by record or otherwise that it has been dispensed with.

CHAPTER 23.

RESTRICTIONS IN DEEDS UPON THE USE OF PROPERTY CONVEYED.

Sec. 160. WHAT RESTRICTIONS PERMITTED. The law permits restrictions as to the use of the land so long as the restriction is not against public policy.

Restrictions in the use of land are not encouraged by the law[102] but are nevertheless permitted so long as they are not against public policy. Thus, there may be restrictions as to what sort of buildings shall be erected, how far from the lot line buildings shall be placed, that the building shall cost a minimum figure or be of a certain type, that certain industries shall never be conducted there, etc. Some restrictions are, however, not permitted, for instance when they are for the purpose of creating a monopoly, etc.[103]

Sec. 161. RESTRICTIONS BY WAY OF COVENANT OR CONDITION. The restriction in the deed may be by way of a covenant or condition, the breach of which will defeat the title.

The use of the land may be regulated by the grantor by way of a *covenant,* the breach of which will give an action for damages and which will be restrained by injunction; or it may be by way of a *condition,* that if the

102. Hutchinson v. Ulrich, 145 Ill. 336.
103. Burdel v. Grandi, 14 L. R. A. (N. S.) (Cal.) 909.

land is used in the way prohibited the title shall thereupon revert to the grantor or his heirs. The breach of the covenant will be enjoined or an action for damages will lie on account of it. The breach of the condition operates to cause a forfeiture of title.

Sec. 162. WHEN A RESTRICTION CREATES A CONDITION. A restriction will create a condition defeating the title only in case it is expressly declared to be a condition with the right of re-entry by the grantor and his heirs. Calling a restriction a condition does not in itself make it such.

A court does not favor forfeitures of estates as this is a harsh remedy, and although it permits an estate to be granted upon a condition the non-observance of which will defeat the title, yet the intent of the parties must be plain, and it will enforce a restriction as a covenant and not a condition wherever possible.[104] Thus if it is stated in a deed that the land is granted on the express condition that no flat building shall ever be erected there, the parties might not mean thereby that the breach of that condition would result in a forfeiture of the estate but only mean that the grantee should be subject to an injunction in case he attempted to break the condition or be subject to damages for actual breach. Accordingly the court will call a restriction a *covenant* rather than a condition wherever possible, even though the word "condition" may have been used, provided nothing further is stated to show that the restriction was meant as a condition. It is therefore necessary in most states for the grantor to declare somewhat as follows: "That this estate is granted upon the condition that no saloon shall ever be conducted upon the premises and in case of

104. Post v. Weil, 115 N. Y. 361.

breach of this condition the title shall revert to the grantor. his heirs, or assigns, and he shall have the right to re-enter and be possessed as of his former estate."

Furthermore the cases hold that the estate is not defeated until the grantor does actually make a re-entry.[105]

Sec. 163. AGAINST WHOM RESTRICTIONS MAY BE ENFORCED. Restrictions as to the use of land may be enforced against the grantee and all succeeding purchasers.

A restriction upon the use of land may be enforced against the grantee or his heirs or any person who by descent, will or deed comes into the ownership of the property. Assuming that the restriction is on record or known to the party involved, he takes subject to the restriction. It is not necessary that the restriction be repeated in every successive deed, but a party purchasing or getting an estate in any way is bound by the record and the grantor may thus govern the restriction no matter into whose hands the estate may pass.

Sec. 164. BY WHOM RESTRICTION MAY BE ENFORCED. A restriction may be enforced by the grantor or by anyone for whose benefit the restriction was made.

Restrictions are usually made for the benefit of certain other property, as where a person lays out city lots and makes a building restriction upon each of them. Here the restriction upon each lot is in favor of all the other lots in the same subdivision or block, and subsequent owners of these lots or any of them may enforce the restriction against the owner of any lot. Otherwise restriction would be of no value. It has been created for

105. Id.

the purpose of preserving the character of the neighborhood and may be enforced for this purpose by anyone affected.

Sec. 165. WAIVER AND LOSS OF RIGHT TO ENFORCE RESTRICTION. On account of the fact that the court does not favor restrictions upon the use of land the right to enforce such restrictions is easily waived or lost and may be expressly waived by the parties entitled to enforcement.

A person entitled to the right to enforce a restriction may see fit to expressly waive it by written agreement or otherwise. So the right may be lost by conduct or by change of situation. The right must be strictly and promptly enforced; otherwise it will be considered as having been waived.[106] Thus if one owns a lot in a block divided into lots upon which there is a building restriction he will lose the right to enforce the restriction if he permits his neighbors or anyone of them to break the restriction without protest. Thus if A owns lot No. 1, and B owning lot 9 breaks a building line restriction without A's protest A will usually be held to have waived the right in respect to lot 2 or 3, etc., and certainly has waived it in respect to lot 9 by not proceeding on first notice to enjoin B from breaking the restriction.

So where the change in the neighborhood is so great that the original purpose and value of the restriction has become lost there will be a loss of the right to enforce the restriction, especially in a court of equity; for instance, if the neighborhood was originally intended as a residence district, it may, owing to the encroachment of business, have lost its value for that purpose. Here no

106. Evertsen v. Gertsenberg, 186 Ill. 344.

valuable right would be protected by the enforcement of the restriction and enforcement would mean the prevention of improvement along the lines of development in the neighborhood. A court of equity will not enforce the restriction where by change of circumstances, it is no longer of value.

Thus, in a very recent Illinois case, there were covenants not to build beyond a certain line, and complainant brought suit to prevent defendant from violating the covenant. The defendant showed that other parties in the same block had violated the covenant, without protest, and furthermore that the erection of an elevated railway had changed the character of the neighborhood. The court refused an injunction on these grounds. Incidentally, it held that the erection of bay windows, porches and the like, over a building line, is a breach of the covenant.[107]

107. Knelp v. Schroeder, 255 Ill. 621.

PART VIII.

TITLE BY DESCENT AND BY WILL.

CHAPTER 24.

TITLE BY DESCENT.

Sec. 166. EXPLANATION. Upon a person's death, the law designates to whom his property shall pass; but extends to a person the right to direct the disposition by a direction, called a will, to take effect at his death.

As the law permits private ownership of property it is concerned that upon a person's death, his property shall pass to the ownership of others. Naturally, those who are the most logical beneficiaries are his relatives, and to those relatives the law accordingly disposes it, and calls them his "heirs"; but it also permits a person to name his own heirs, although in that case they are not called heirs, but (in case of personal property) legatees, and (in case of real property) devisees. In this and the succeeding chapter we are concerned with this course of descent and distribution where there is no will, and with the disposition where there is a will.

Sec. 167. TERMINOLOGY.

"Testator"—one who leaves a will.
"Intestate"—one who dies without a will.
"Devisee"—one to whom real property is left by will.

"Legatee"—one to whom personal property is left by will; the gift to whom is called a "legacy" or "bequest."

"Heir at law"—one who takes the real property of an intestate.

"Distributee"—one who takes the personal property of an intestate.

"Personal representative"—executor or administrator.

"Executor"—one named in a will to execute it, that is, to administer the estate.

"Administrator"—a person named by the court to administer an intestate estate.

"Administrator with the will annexed"—one who is named by the court to administer a testate estate where the will names no executor or where the executor named cannot or does not serve.

"Administrator with the will annexed de bonis non"—one who is named by the court to finish the administration of an estate partially administered by an executor or by an administrator with the will annexed.

Sec. 168. RULES OF DESCENT. THE ANCIENT CANONS. By the common law there were a number of rules governing descent of real property, called "canons of descent."

It being once established that it is the policy of the law to pass the property of a person at his death to someone else, instead of having it revert to the state it becomes necessary for the law to indicate who those persons are. It may leave this to the owner himself, but the owner may make no disposition and accordingly the law must have rules of succession.

The early canons of descent were as follows:

(1) "Inheritances shall lineally descend to the issue

of the person who last died actually seized *in infinitum* but shall never lineally ascend."

(2) "The male issue shall be admitted before the female." The canon means of course that the sons of man inherited by the common law instead of the daughter, and that the female inherited only in case there were no sons. This is a rule that has been abolished in American Jurisprudence, all the children, either male or female, being equally entitled.

(3) "Where there are two or more males of equal degree the eldest shall inherit." This rule is called the rule of *primogeniture* and gave the estate to the eldest son. The purpose originally was to keep the inheritance and the consequent loyalty to the lord undivided.

(4) "The lineal descendants *in infinitum* of any person deceased shall represent their ancestor." This rule means that the descendants of a person stand in his place. Thus the eldest son inherits and then his son and then the grandson in preference to the other brothers of the eldest son. In a modified sense this rule is still true, in this, that a person's heirs, as named by the law, stand in his stead and have the same estate that he had.

(5) "On the failure of lineal descendants or issue of the person last seized the inheritance shall descend to his collateral relations being of the blood of the first purchaser." As Blackstone says, "If Jeoffrey Stiles purchases land and it descends to John Stiles and John dies seized though without issue; whoever succeeds to this inheritance must be of the blood of Jeoffrey, the first purchaser of this family." This rule is now only true in this sense, that on the death of a person without children the estate goes to his collateral relations, that is, his brothers, cousins and the like.

(6) "The collateral heirs of the person last seizea

must be his next collateral kinsman of the whole blood." We mean by one of the "whole blood," one that is derived from the same couple of ancestors. In our day the law admits the half blood and the whole blood equally, that is, a man's nearest collateral relations will take without reference to the whole or the half blood.

(7) "In collateral inheritances the male stocks shall be preferred to the female unless the land in fact descended from a female." This rule is an ancient one, now obsolete.

These are the ancient canons of descent but our modern canons differ from them quite essentially as we will note in the next section.

Sec. 169. THE PRESENT DAY CANONS OF DESCENT. The rule of descent differs in some respects in the different states but may be generally stated as follows:

In the first place when a man dies leaving children these children take his real estate whether or not he leaves a wife or other relatives. The wife of course has her dower and she may have also a portion of the *personal* property, absolutely as her own in the character of an heir. In the second place if a man dies leaving no children, the estate goes to his wife, his parents, his brothers and sisters in portions named by the law, as for instance, that the wife shall get one-half and his parents, brothers and sisters or their descendants shall get the remainder in equal proportions. This in a general way indicates the course of descent. The children are first preferred, and then the other relatives, if there are no children or descendants of children. Inheritances descend *per stirpes* and not *per capita,* just as at common law. That is, if A

dies leaving two children and two grandchildren of a child deceased the estate is divided into three parts, one part to each child and one part to the two grandchildren. If the division was per capita the four heirs would each get a one-fourth part.

CHAPTER 25.

TITLE BY WILL.

A. Definition and Kinds of Wills.

Sec. 170. WILL DEFINED. A will is a disposition of one's property to take effect at his death. A supplemental addition to the will is called a codicil.

The law permits one to direct how his property shall go upon his death. The direction, itself, if made according to legal requirements is called a will. The law sets out certain formalities and these must be observed.

A will is also called a "testament." The term "codicil" is used to describe an addition to an existing will.

Sec. 171. KINDS OF WILLS. The usual will is in writing signed and witnessed. Oral wills, permitted under rare circumstances, are called nuncupative. A will written and signed by the testator entirely in his own handwriting is called holographic.

The ordinary will is one in printed, typewritten, or handwritten form, and signed and witnessed. In one or two states if a testator writes out the will entirely in his own handwriting and signs it, the will is valid without witnesses. It is then called a holographic will. The law permits one in his last illness and about to die, to dispose of his *personal* property (not his real estate) by oral statement in the presence of witnesses. Such a will is called

nuncupative. Such wills are not looked upon with favor, and are very rare.

B. Of the Capacity to Make a Will.

Sec. 172. MINORS. A person under age cannot make a will.

The right to make a will is entirely statutory and generally speaking, it is requisite that the party must be of full age in order to make a will.

Sec. 173. INSANE PERSONS. An insane person cannot make a will except in a lucid interval.

Very clearly one who is insane cannot give his property by will, although if he has lucid intervals he may make a will during such interval.

Sec. 174. WHAT MENTAL CAPACITY REQUIRED. A party must understand the nature of his act in making a will.

A person who makes a will must be strong enough mentally to understand the nature of his act. He need not know enough to perform his ordinary business affairs but he must know what he is doing. Thus, an old man who has become too feeble minded to perform ordinary business affairs may yet know enough to make a will, provided he understands that he is disposing of his property by will.

C. Wills Secured by Fraud, Undue Influence, Etc.

Sec. 175. WILLS OR DEVISES SECURED THROUGH FRAUD. Gifts secured through fraud are void.

Where through fraudulent representations a gift is secured which otherwise would not have been made, as

where the beneficiary represents that if the will is made to him, he will do certain things, the will is void.

Sec. 176. WILLS OR DEVISES SECURED THROUGH UNDUE INFLUENCE. Where a gift by will is secured through undue influence the gift is invalid.

Undue influence means such influence that the will of the testator is overcome and he practically makes a will at the dictation of another. Mere persuasion, however great, does not constitute undue influence. Undue influence usually exists in cases where there is a relationship of dependency, as in case of physician and patient, attorney and client, parent and child, etc. Where the circumstances show that there was such an influence upon the testator that the freedom of his mind was thereby destroyed, the will is void. Very often religious beliefs of peculiar nature are involved in cases of undue influence on the strength of which another person works upon the fears or hopes or prejudices of the testator and thus secures a gift to himself.

Sec. 177. WILLS MADE UNDER INSANE DELUSION. A gift made by will under an insane delusion is void. An insane delusion is a belief which is unsupported in fact and refuses to give way to the argument of others.

Wills are often declared void because based upon what the law terms an "insane delusion." An insane delusion differs from insanity in that it is a delusion upon some one subject while as to other subjects the testator may be perfectly rational. Queer beliefs do not constitute insane delusions so long as they have any support in fact or if they are of a mere religious nature. Thus one's belief in spiritualism or religious beliefs by him of a

very peculiar sort never constitute insane delusions because religion is a matter scarcely susceptible of proof and rests in belief only. An insane delusion is a belief which is not based upon any facts and persists in the face of evidence and the argument of friends. Thus in an Illinois case, a father believed his son to be guilty of serious crimes and manifested an unnatural hatred for him. As a matter of fact the son was of high standing in the community and there was no evidence of any sort tending to prove him anything except a man of the highest integrity. The court held that his disinheritance by will would be set aside because of an insane delusion respecting him.[108]

D. The Formal Requisites.

Sec. 178. WILL MUST BE IN WRITING. A will must be in writing but there is an exception in case of a gift of personal property in one's last illness.

It is the general rule that a will must be in writing. There is one exception to this when a person makes a will of his personal property when he is *in extremis* in his last illness. Such an oral will of personal property is called a nuncupative will and was formerly a will permitted to be made by a soldier or sailor *in extremis* in respect to his personal property. By statute the right to make such a will has been extended to others but it is usually provided that there must be a certain number of witnesses present and they must reduce the will in writing in a certain number of days. Real property may never pass by such a will. Nuncupative wills are not favored by

108. Snell v. Weldon, 243 Ill. 496.

the law and are very rarely upheld. This is because of the opportunity for fraud in such cases.

Aside from this exception the will must be in writing. This term includes typewriting or even printing.

Sometimes a reference is made in a will to another document and the testator attempts to make this other document a part of his will. This is called "incorporation by reference." In such a case the document does not become a part of the will unless it is clearly identified by the language of the will itself and is then in existence. Thus in the case of "Bryan's Appeal" [109] a testator left property to W. J. Bryan according to a document to be found among his papers. The court refused to make this document a part of the will because it was not clearly identified and it did not appear that it was in existence when the will was made.

Sec. 179. A WILL MUST BE SIGNED. A will must be signed by the testator or by some one for him in his presence and at his direction.

It is essential that the testator sign the will. If too weak to sign it another may sign it for him in his presence and at his direction, but otherwise the signature cannot be made by an agent. The signature may be in any form as by a cross where the testator cannot write or is too weak to do so.

Sec. 180. WILL MUST BE PROPERLY WITNESSED. It is essential that the will be witnessed by the number of witnesses provided by law.

109. 77 Conn. Rep. 260.

A will must be witnessed. In one or two states a holographic will need not be witnessed but in all other cases, and in most states in all cases, the will must be witnessed. A will should not be witnessed by beneficiaries or executors and if it is witnessed by a beneficiary the beneficiary cannot take under the will. It is very essential therefore that completely disinterested parties witness the will.

It is not necessary that the witness read the will.

The will must be witnessed in the presence of the testator. Some cases hold that this means in the uninterrupted range of the testator's vision, that is, the witnesses must be in such a position that he can see them sign, provided he cares to do so.[110] They must not go into an adjoining room or put any barrier between the testator's vision and themselves. An exception would be made of course in the case of a blind person. It follows therefore that witnesses cannot sign elsewhere even though they acknowledge the signature in the testator's presence. The testator may acknowledge his signature to the witnesses but the witnesses must actually sign in the testator's presence.

Sec. 181. THE ATTESTATION CLAUSE. The attestation clause is a clause signed by the witnesses asserting the publication of the will and their act of witnessing it at the testator's request.

A form of attestation clause appears in the appendix. It is much better practice to have such a clause, but it is not indispensable and a will is properly witnessed if the witnesses merely sign their names thereupon.

110. Drury v. Connell, 177 Ill. 43.

E. The Orderly Parts of Wills.

Sec. 182. IN GENERAL. A will does not have to be in any special form but is usually drawn in a certain orderly way.

We will find that if a will is in writing and signed by the testator and properly witnessed it is good though it is informally drawn, but a will properly made should be drawn in an orderly way, and we will notice in the following sections the usual order of a will.

Sec. 183. THE INTRODUCTION. The introduction is a statement that the testator does make, ordain, publish and declare the writing to be his will.

A reference to the form in the appendix will show the form of expression used in the introduction. This form sometimes begins with such words as these: "In the name of God, Amen" and sometimes refers to the uncertainty of life and states that the testator is indebted to Providence for the blessings he enjoys, but these recitals are not now made so often and at such length as formerly.

Sec. 184. THE DEVISES AND BEQUESTS. After the introduction sometimes follows a direction to the executor to pay debts and funeral expenses as soon as conveniently may be. Then follow in order the devises and bequests.

In this part of the will there should be the utmost certainty and there should also be a provision made for all contingencies. It very often appears that a will is so carelessly drawn that its meaning is not clear. For example: Sometimes powers are given which would seem to imply the ownership of property and yet the title is not directly given; and in the event of the death of the

donees before the testator no provision is made for the disposition of the estate. This is the part of the will which is the heart thereof and exceeding care should be exercised, in framing it. Wills should always be drawn where possible, by an experienced and able lawyer who knows the legal effect of words used, the effect of possible events, like marriage or birth of child, and is accustomed to consider all contingencies.

Sec. 185. THE RESIDUARY CLAUSE. A residuary clause is often stated which provides for the disposition of all the estate not specially disposed of.

Such a clause is of course unnecessary where all of the estate is given to any one person or class of persons but in the event the will consists of specific devises and legacies, there should be a residuary clause naming some one to whom the residue, if any, is to go.

Sec. 186. THE APPOINTMENT OF AN EXECUTOR. An executor is to be appointed and his appointment usually follows the gifts though it may be at any place in the will.

It is important to name an executor who should be some person in whom the testator has faith, or a trust company qualified by law to act as executor. In large estates it is often desirable to name a trust company but in the smaller estates this is not usual. Several executors may be named, especially if the estate is a large one, and this makes it reasonably certain that at least one of them will outlive the period of administration. If no executor is named the will is not for that reason invalid but the court will name an "administrator, with the will annexed" or more shortly, "administrator w. w. a."

Sec. 187. THE CONCLUSION. The conclusion of the will is a mere statement that the executor has affixed his name on a certain date.

See the Appendix for the form of the conclusion.

Sec. 188. THE SIGNATURE AND ATTESTATION. The will must be signed and attested as we have heretofore seen.

F. The Revocation of Wills.

Sec. 189. THE RIGHT TO REVOKE. A will may be revoked at any time before the testator's death unless he is under contract not to revoke.

A will is a revocable instrument. It confers no rights except upon the death of the testator. It takes effect upon death and then only. A will is completely within the power of the testator until his death and he may make any number of wills, and yet finally die intestate.

It is true that a testator may be under contract to make a will, or not to make a will, and where this contract is upon a full and fair consideration the courts will enforce it.

Sec. 190. METHOD OF REVOCATION. A will may be revoked by another will or codicil or by burning, tearing, obliterating, canceling with the intention of revoking, or it may be revoked by certain circumstances, as subsequent marriage.

How a will must be revoked is governed by local statutes. However, we may say generally, that a will may be revoked in the following manners: First, by another will or a codicil expressly declaring revocation

or revoking by implication because covering the same ground. A will does not necessarily revoke the former will, although as a matter of fact it usually does because it covers the same subject matter. It is also customary not to leave anything to implication but to expressly revoke all former wills. A will may also be revoked by *tearing, obliterating, burning, canceling,* and the like, by the testator or by someone for him in his presence and at his direction with the intention of revoking it. If a will is lost or destroyed it is still in force if there was no intention of revoking it and the destruction was not by the testator or someone for him. It is possible for the testator to revoke a part of a will by obliterating or canceling clauses therein but this is not advisable. Any interlineations made by him are of no effect unless the will is subsequently republished and rewitnessed, otherwise he could make a will without complying with the law of wills. If a testator should write on the bottom of a will or in the margin or even across the face of it "I hereby revoke this will" that would be without effect because it is not a revocation in the manner provided by law.

A will is also usually revoked by subsequent marriage of the testator upon the theory that this is a change of circumstances which he did not have in mind when he made the will.[111] Subsequent birth of child does not now revoke the will although in many states it amounts to a partial revocation. In this case the child will take his portion as heir, the other gifts abating to that extent unless in the will an express intent to disinherit the child

111. At common law marriage of *testator* alone did not revoke; but marriage and birth of child did. Marriage alone of a *testatrix* revoked her will. Statutes in many states have made marriage alone sufficient in either case.

appears; and this is sometimes advisable because the testator wants to leave his entire estate to the other parent relying upon such person to properly care for the child and thus keeping the estate from being tied up until the child becomes of age.

CHAPTER 26.

ADMINISTRATION OF ESTATES.

A. Starting the Administration.

Sec. 191. IN GENERAL.

When a person dies, his estate must be disposed of to those who, as creditors, or as heirs and distributees, or as beneficiaries under a will, are entitled thereto. This requires administration in the court provided for that purpose. We have already discussed the law of descent and heirship, and the law of wills. Let us now in this chapter concern ourselves with the settlement of the estate of a deceased person, whether he has left a will or has not left a will. In the one case he is called a testator, in the other, an intestate. He may die intestate as to some property and testate as to other, but this is very unusual.

Sec. 192. THE COURT OF ADMINISTRATION. Courts which have jurisdiction of estates of decedents are called Courts of Probate, Surrogate's Courts, etc.

Courts of administration of the estates of deceased persons are established, called Courts of Surrogate, Orphan's Courts, Probate Courts, and the like. Generally such courts have also other jurisdiction, as over guardianships of minors, and of insane persons, and may have also other classes of jurisdiction.

Sec. 193. APPLICATION FOR LETTERS. The proceedings are formally opened in the court by an application for letters of administration or letters testamentary.

The first step in probating an estate may be the mere filing of the will. But generally this is accompanied with the petition. The petition sets forth the death, and recites whether there was a will or whether decedent died intestate. It prays for letters to issue to the petitioner or to the person entitled to them.

Sec. 194. WHO ENTITLED TO BE ADMINISTRATOR. The nearest relative is ordinarily entitled to administer.

In case of intestate estates, or testate estates in which there is no executor named, or the one named can not or will not serve, the statute provides who shall be entitled to administer. This naturally is the nearest relative, if of age and resident in the jurisdiction, or whatever limitations may be imposed. The statute provides also that the Public Administrator may serve in the event there is no one else who can or will serve. Creditors may apply for letters of administration, if the relatives entitled to do so do not act.

Sec. 195. WHO QUALIFIED TO ACT AS EXECUTOR. The person named in the will as executor is entitled to serve as such, unless he has the general statutory disqualifications.

The statute usually sets forth some qualifications as that of full age or residence in the jurisdiction, to entitle one to act as executor. If he is not debarred by these general qualifications, he is entitled to serve, and the court has no discretion to refuse him. The fact that he is interested in the estate, as creditor or as beneficiary does

not debar him. In fact it is quite frequent that an executor is one to whom the entire estate is given.

One cannot be an executor and also witness to will, but if he is not a necessary witness, he may serve.

Sec. 196. BOND OF ADMINISTRATOR OR EXECUTOR. The personal representative must provide the bond required by law, the amount of which depends upon the size of the personal estate.

The executor or administrator must furnish bond with such sureties thereon and in such amount as the law requires.

A will however may *waive* bond, and in that case no bond is necessary unless it appears to the court that the interest of the estate so requires.

Sec. 197. PROOF OF HEIRSHIP. Whether an estate is testate or intestate, the heirship must be proved as a part of the record.

In case of a will, the course of descent and distribution has been changed, and those who take, do so as beneficiaries under the will, rather than as heirs, but whether there is a will or not, the heirship must be proved and the heirs notified, in order that they may protect their interests.

Any relative is a competent witness to prove heirship who knows the family history even though his information comes partially from hearsay.

Sec. 198. PROOF OF WILL. The will must be proved by the witnesses thereto.

When the will is filed the court sets it for hearing. The witnesses to the will must prove it. In case they are

absent their depositions may be taken. If the witnesses are dead, or for any reason their testimony cannot be procured, proof of their handwriting will suffice.

The witnesses to the will testify as to the mental condition of the testator and that they believed and now believe him to be of sound mind and disposing memory.

If the will is duly proved then it is "admitted to probate" by formal order.

Sec. 199. INVENTORIES AND APPRAISALS. It is the duty of the administrator or executor to file an inventory of the assets.

The personal representative must file shortly after his appointment and qualification, an inventory of all the assets of the deceased that have come to such representative's hands or knowledge, describing the estimated value thereof, and setting forth whether the credits are good, doubtful or desperate.

Generally the law provides for appraisers to value the tangible personal assets.

Sec. 200. WIDOW'S AND CHILDREN'S AWARDS. By statute generally a certain award is made to the widow, which is a debt against the estate.

By common law there was a right on the part of the widow to occupy the mansion house for a specified time called the *"widow's quarantine."* By statute there have been various provisions in the nature of awards to a widow sometimes enlarged where there are children, and this award the widow is entitled to as a debt against the estate. Its amount is governed by the statute and the size of the estate. Generally, it is made a debt having priority.

B. The Title of the Personal Representative.

Sec. 201. NATURE OF OFFICE. The office of the personal representative is that of a trustee who succeeds to the title of the deceased in respect to personal property.

The personal representative is a *trustee*. He holds the property of the deceased in trust, and the rules applicable to trustees generally apply to him. Of course he is a trustee with a special trust to perform, the duties under which are limited by the purpose thereof.

Sec. 202. TITLE OF PERSONAL REPRESENTATIVE. A personal representative gets title to the personal property of deceased.

The executor or administrator gets title to the personal property of the deceased. He does not get title to the real property unless the will gives it to him.

At common law the executor had no power over the real estate whatever and that is also the rule in American jurisdictions, *except* that if necessary to pay debts by the insufficiency of the personal estate, the executor or administrator may apply to the court for leave to sell such real estate or so much thereof as may be necessary to pay debts.

Sec. 203. WHAT ARE ASSETS. Any form of personal property, tangible or intangible, which belonged to deceased passes to the personal representative for purposes of administration.

As a general rule whatever things were assets to the decedent at the time of his death are assets to his personal representative, for purposes of payment of debts and

other administration. A few particular species of property may be considered.

(1) Corporate stock.

This becomes assets of the estate; but it has been held that interest or dividends declared after the owner's death pass to the specific legatee, of the stocks or bonds, and are not subject to payment of debts (Gordon v. James, 1 L. R. A. N. S. (Miss.) 461). The personal representative is entitled to vote stock upon proof of his letters, although not transferred on the books of the corporation.

(2) Partnership assets.

The assets of a partnership pass to the surviving partner, and not to the personal representative of the deceased partner; subject, however, to the duty of the surviving partner to wind up the affairs of the partnership and account with the executor.

(3) Insurance money.

Passes to the executor if payable to deceased or his estate, executors or administrators but not if payable to other beneficiaries. Therefore in the latter case the executor has no title and creditors cannot reach the insurance. (People v. Petrie, 191 Ill. 497, 61 N. E. 499.) Insurance money may by statute also be exempt.

(4) Rights to sue.

Rights to sue pass to the executor or administrator, as claims on notes, injury to property, etc. But purely personal claims, as for personal injury, do not pass.

C. Duties and Liabilities.

Sec. 204. DUTY TO GET IN ASSETS. It is the duty of the personal representative to get in all assets of the estate, bringing suit where necessary.

An executor or administrator should collect the assets for their use in payment of debts or division among legatees and distributees. He should sue to collect where collection cannot otherwise be made, proceeding however under order of the court.

Sec. 205. DUTY IN MAKING INVESTMENTS. If under the will or because of delay in administration a personal representative has funds to invest, he should invest them according to the rules that govern investments by trustees.

The duty of a trustee is to invest with regard to safety of investment for as large an income as is compatible with safety, if under the directions of a will, or because there are substantial funds, that would otherwise lie idle it is the representative's duty to invest. The same rules govern as govern trustees generally as we have heretofore considered. It is generally not his duty to change investments unless they are unsafe, in which case he should withdraw them from the hazard.

Of course the will may be specific as to investment, and it is the duty to follow the directions, but even in such a case, doubtless a change in the character of such securities might prevent such investments. The court's direction should be sought in such a case.

If a personal representative does not invest when he should, he is personally chargeable with interest.

Where money is deposited in a bank, it should always

be in the name of the estate, or in some way at least that will designate and set apart the trust. Otherwise he will be personally liable if the bank fails.

D. Payment of Claims.

Sec. 206. PROOF OF CLAIMS. If there is any doubt about a claim against an estate, the executor should require it to be proved.

Creditors must prove their claims against the estate, unless allowed or paid by the executor or administrator.

The estate is to be administered within a certain period provided by the law, as one or two years, and claims must be presented by the creditors of the estate and proved by them by competent evidence.

The law divides claims into classes giving one class priority over others; thus there will be claims of the first class, second class, third class and so on. Thus funeral expenses, etc., the widow's award, etc., and claims of various sorts have priority over claims of general creditors. Of course creditors who have security are not deprived thereof and the security is unaffected by the death of the debtor.

Sec. 207. SALE OF PROPERTY TO PAY DEBTS. If the funds of the estate are insufficient to pay debts, the assets must be sold to pay same.

The executor or administrator must convert the estate into sufficient funds to pay the debts thereof. Real property, even, may be reached for this purpose, although it was unavailable at common law.

In case of a will which makes specific bequests and

devises, the general rule is that the general legacies first abate, then if necessary the specific legacies, and personal property abates before real estate.

E. Settlement and Final Account.

Sec. 208. PAYMENT OF LEGACIES. Legacies are payable as provided for in the will if the estate is sufficient to pay same.

Legacies are specific, as a watch, a horse, or a chair; general, as a sum of money. The general legacies must give way in favor of specific legacies if necessary.

Sec. 209. SETTLEMENT AND DISTRIBUTION. After the estate has been in probate the length of time provided by the law, the estate must be settled and distributed, and the executor or administrator discharged, from further duty.

We have already indicated the manner of distribution and settlement. The executor or administrator must do this according to the law of the state in which the probate is had and is then entitled to be discharged. Where the estate is solvent he need not wait the full period to distribute gifts and advance portions but he does this at his own risk unless an order of the court is secured.

PART IX.

CHAPTER 27.

CONVEYANCING.

A. Contracts to Sell Real Estate.

Sec. 210. HOW REAL ESTATE IS USUALLY SOLD. Real estate is usually sold by first drawing up a contract between the prospective seller and buyer providing that the seller will sell on certain terms and at a certain price and the buyer will buy upon those terms and at that price provided the title is found good upon examination of the abstract of title or guaranty policy to be furnished by the seller.

While the contract between the buyer and seller may take any form and while there may be indeed no contract of an enforceable sort prior to the deed, yet, as a rule, we find that where real estate is sold there is usually a contract of sale drawn up between the parties whereby the seller agrees to sell and the buyer to buy on certain terms within a certain time and upon certain conditions. An abstract is to be furnished by the seller and examined by the buyer in order to discover the soundness of the title. Then after this time, all having been found satisfactory, the deed is made.

As we know from our consideration of the subject of contracts, contracts to sell real estate, though they may be carried out if oral, are not enforceable unless in writ-

ing if one of the parties sees fit to break the agreement and to avail himself of this technical defense.

Sec. 211. THE FORM OF THE CONTRACT OF SALE. The contract of sale is often upon a blank form prepared for that purpose and it provides the seller shall give a merchantable title and that the buyer shall assume the burdens and conditions therein named.

A form of a contract of sale is set forth in the back of this book and should be studied by the reader. Customary forms vary in different localities, but their general purpose is to bind the seller to make a deed and the purchaser to take the land provided it appears that the title is good. When parties agree to buy and sell it is desirable that the bargain be bound between them and yet of course there must be an opportunity to look into the title and fix up the defects if any there be. In this contract of sale, the terms are all agreed upon. The price is stated and if a mortgage is to be given back by the purchaser or to be assumed by him, this is there set out. After the contract is signed it becomes the seller's duty to furnish an abstract of title within a certain time therein stated and it becomes the seller's privilege to then examine the abstract and to report any defects on the title therein found. These defects are then cleared up, if possible, by quitclaim deeds, affidavits and the like and the deed is then given. According to some forms, the buyer, when he signs the contract, agrees to assume all building restrictions which may be of record and consequently he should know if there are any such restrictions before he signs the contract because by his agreement to assume them he could not afterwards object to them if any were found. Of course it may be his desire to have building restrictions on the

land, but at any rate he should know what they are. In reference to other burdens of various sorts he does not assume them unless it is specifically noted in the contract and therefore all these burdens and defects must be removed by the seller before the buyer can be compelled to take the title. After this abstract has been furnished by the seller and examined by the buyer and the title found to be or made satisfactory, the deed is then made between the parties.

In some localities the seller agrees to furnish a policy guaranteeing the title instead of an abstract. In that case the procedure is much the same as above described, except as modified by this difference.

Sometimes when the real estate is sold upon installments the contract provides that a certain number of installments are to be paid before a deed is to be given and if the installments are of substantially the same amount as rent would be, it is provided that in case of default by the buyer the installments shall be retained by the seller as liquidated damages.

It is almost always provided in any contract of sale that a sum deposited with the seller by the buyer shall be retained by the seller as liquidated damages in case the buyer does not perform his agreement and to be returned to the buyer in case the seller cannot make a good title or a title satisfactory to the buyer.

This contract of sale must be recorded by the buyer if he would secure absolute protection, unless he goes into immediate possession. At the same time, it is not desirable from the seller's standpoint that the contract be recorded because it may result in clouding his title in case the contract is not carried out by the buyer and the buyer refuses to give him a release from the contract, and this would necessitate proceedings in court to clear up the

title. It also if recorded increases the record of the title, thereby lengthening and increasing the cost of further abstracts. For these reasons it is customary not to record a contract of sale but merely to wait until the deed is made and then record that.

Sec. 212. SELLER TO CONVEY MERCHANTABLE TITLE. The seller agrees to convey a merchantable title subject to burdens assumed by the buyer. A merchantable title is a title which has in it no serious defects preventing its free transfer by the buyer or subjecting him to expenses to clear up his title.

The seller is supposed to give and by his contract stipulates to give a good, merchantable title. A merchantable title is one that is practically free of defects and burdens except such as are specifically assumed in the contract by the purchaser. Thus outstanding mortgages not assumed by the purchaser, unreleased dower, claims of heirs of prior owners, unacknowledged deeds found in the record, defective conveyances, etc., are all burdens upon the title and detract from its merchantability and all these things must be cleared up by the seller before he can compel the buyer to take a deed. The purpose of examining the abstract is to find the possible defects and report them to the seller that he may have them cleared if he can.

Sec. 213. BURDENS ASSUMED BY PURCHASER. The purchaser often specifically assumes certain burdens as mortgages, building restrictions, special assessments yet unpaid, etc.

We have already noticed that the buyer may assume certain burdens when he signs a contract. There may be an existing mortgage which as a part of his considera-

tion he assumes and agrees to pay or there may be building restrictions upon the record which are assumed by him.

In case there is no mortgage, very often one is made as a part of the transaction where all of the purchase price is not paid down at some later period. Thus the deed is given to the buyer, and as a part of the same transaction he gives back a mortgage to secure a part of the purchase price. Such a mortgage is called a "purchase money" mortgage. It may of course be in the form of a trust deed.

Sec. 214. DESCRIBING THE PROPERTY. The property may be described by metes and bounds or by the legal description if there is any such.

It is desirable that we insert at some place in this book something respecting the description of real property, for this is a very important subject. The reader should be impressed with the importance of care in this respect because a great deal of litigation has been occasioned by mis-descriptions of real property. Very often the property will be wrongly described and the mistake will not be noticed for, perhaps, years afterwards, when it becomes very difficult to clear up the matter. It is very easy to insert "Northeast" for "Northwest," for example.

Property may be described in two general ways: first. by its "metes and bounds" and second, by its "legal description." Property was formerly described, and it is even now sometimes necessary to describe it, by bounding it with reference to natural or artificial monuments. This form of description is quite vague and often results in doubt and confusion. Thus in early days a piece of land would be described by starting at a point indicated by a certain tree, describing the tree, or a certain artificial monument, then proceeding in a certain direction to an-

other monument, and so on until the point of beginning. In this description would be found: first, a reference to monuments, natural or artificial; second, the distance traversed in going from monument to monument; third, the direction; and fourth, the quantity of land thus enclosed. These four were known as (1) monuments, natural or artificial, (2) measures, (3) courses, (4) quantity, and are sometimes referred to as the four "calls." Where these were inconsistent they would be regarded as important and controlling in the order named. Sometimes where we have a legal description it is still necessary to refer to the metes and bounds as shown in the following example which is a mixture of the old and the new form of description:

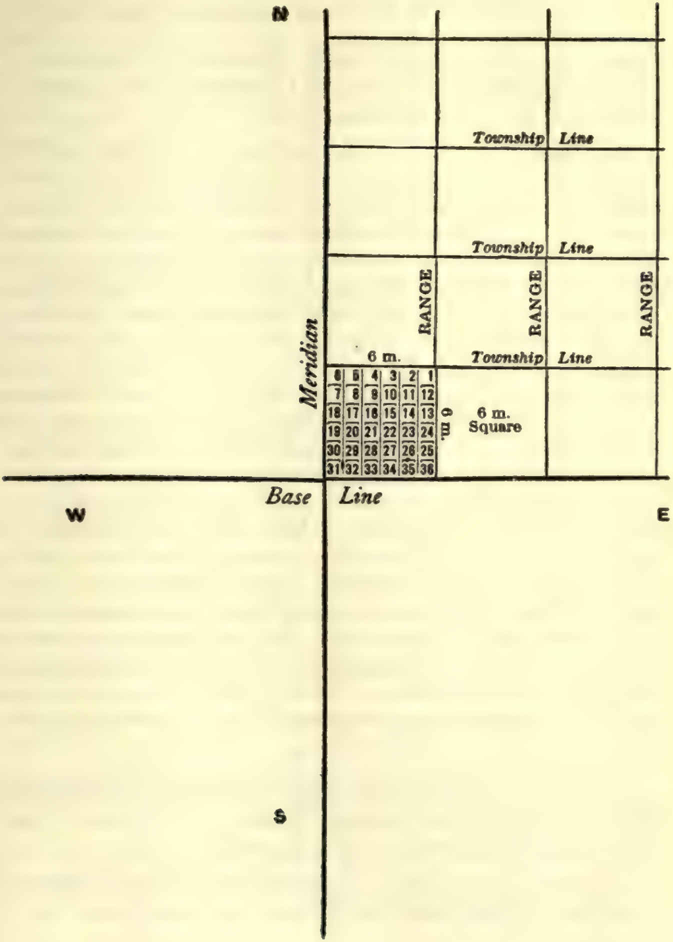
Part of the north 52 acres of the south ½ of the Northeast Quarter of Section 30, Township 41 North, Range 14 East, in the City of Evanston, Cook County, Illinois: Beginning at the intersection of the south line of Mulford Avenue and the west side line of Chicago Avenue, in the City of Evanston; thence southeasterly, along said west line of Chicago Avenue, 186 feet to a point; thence west, at right angles, 53.5 feet to the easterly right of way line of the Chicago & Northwestern Railway; thence north along said easterly right of way line of Chicago & Northwestern Railway 200 feet to the south line of Mulford Avenue; thence east along said south line of Mulford Avenue, being on a line parallel to and 66 feet south of the north line of said South ½ of the Northeast Quarter, Section 30, 51.5 feet to the place of beginning; containing 0.232 of an acre (10,132.5 square feet).

The reader will find it interesting to draw, from this description, a plat of the land described.

Monuments, either natural or artificial, tend to disappear, especially when they consist in trees, posts, etc.,

and descriptions by metes and bounds are hard to follow. So it was that in the settlement of the states—West of the Atlantic Coast States—the surveyors worked out and applied a description which makes the identification of real property a matter of great simplicity and perfect accuracy. The United States was divided by the surveyors from time to time, as occasion required, into "meridian lines," running North and South, of which there are twenty-four, the first one of which is the dividing line between Ohio and Indiana. It is also divided by lines running East and West which are known as "base lines." East and West of the meridians run parallel lines known as "ranges," which are six miles apart; and North and South of the base lines run parallel lines known as "township lines," which are also six miles apart. These range lines and township lines of course cross each other, making squares six miles by six miles, and containing therefore, thirty-six square miles, and these squares constitute "townships." Each township thus created is divided into thirty-six "sections," which are therefore one mile square, and these sections are numbered consecutively from one to thirty-six and contain 640 acres. Sections are themselves subdivided into "quarter sections" and so on indefinitely. Any section may contain in it a "subdivision," known by the name of the subdivider or some other name, or the sections may be divided simply into blocks and lots. A description of real estate is thus rendered exact and easy, reading somewhat as follows: "Lot 9 in block 3, in John Brown's subdivision of the East half of the N. W. quarter of section 18, township 39 North, range 14 East of the third principal meridian, in Cook County, Illinois."

The following outline will show the character of this division:


N
Township Line
Township Line
RANGE
RANGE
RANGE
Meridian
6 m.
Township Line
6 5 4 3 2 1
7 8 9 10 11 12
18 17 16 15 14 13
19 20 21 22 23 24
30 29 28 27 26 25
31 32 33 34 35 36
6 m.
6 m.
Square
Base Line
W
E
S

B. Abstracts of Title and Guaranty Policies.

Sec. 215. THE ABSTRACT DEFINED. The abstract consists in a brief memoranda of all records affecting the title of the real estate in question.

We know that in the country recording laws provide for the record of transactions relating to real estate, otherwise innocent purchasers and encumbrancers are not affected. Consequently a purchaser of real estate must look to the record to find out whether the title is good. This record includes the patents from the United States government and all deeds, wills, administrations of estates, judgments which create liens, mortgages and trust deeds, suits in respect to the title, and in general any public record that in any way affects the title. Now it becomes a difficult task for the purchaser or his attorney to look through these records and be sure he has missed nothing, especially in large cities or in any community where real estate transactions are of frequent occurrence. Accordingly abstracts are made up by abstracters whereby all transactions affecting the title in question are briefly noted. This abstract is a brief resume of every transaction affecting the title so that one by going through the abstract can follow the history of the title so far as it appears of record. In many communities an owner cannot sell his land unless he furnishes an abstract. This abstract is given to successive purchasers and is brought down to date by each seller.

Sec. 216. ABSTRACTS AND ABSTRACT COMPANIES. There are persons and companies who make a business of furnishing abstracts to real estate.

In many communities especially large cities it becomes a matter of great difficulty to discover everything that is

of record, the records being very voluminous. Consequently abstract companies are formed which have experienced abstracters and these companies keep a record of all transactions and are able to furnish on short notice an abstract of title concerning any piece of real estate situated in the territory which they cover.

Sec. 217. GUARANTY POLICY DEFINED. A guaranty policy is a form of insurance of the title.

Some abstract companies write what are called "guaranty policies" which are assurances by the company that the title is good, subject to whatever defects may be named therein. This is simply title insurance and the company must stand good for loss up to the amount named on account of defects not excepted.

A guaranty policy of course does not operate to give a good title but it is merely an insurance upon the title.

This practice is growing in favor and purchasers are now frequently content with such policy and no abstract.

Sec. 218. OPINIONS OF TITLE. An opinion of title is a written statement by an attorney or other examiner of the title setting forth that person's opinion of the title based upon his examination of the abstract.

We have seen that the buyer secures an abstract of the title to be examined. Usually he has his attorney to examine this and the attorney reports his opinion of the title. This opinion is merely the attorney's conclusion when he has examined the title. It sets forth that the attorney has examined certain abstracts therein named and that upon such examination he finds title on a certain day in a certain person subject to the burdens and defects

which he then enumerates. This opinion should give the exact state of the title showing all mortgages, liens and claims of whatever sort as shown by the abstract which he has examined. As we know parties in possession have rights which must be taken account of, and consequently the attorney always finds title subject to the rights of parties in possession, if any. This is merely to protect himself or call attention to the fact that the purchaser must know whether there are any parties in the possession and what their claims are. This opinion of title may be looked upon in a way as a very brief abstract of the abstract.

Where guaranty policies are secured the opinion is generally omitted because the guaranty policy is based upon the opinion of the abstracter's attorneys.

C. The Torrens System of Registering Titles.

Sec. 219. THE TORRENS SYSTEM DEFINED. The Torrens system is a system whereby titles to real estate are registered as being in a certain person at the date of registration and a certificate of title is issued by the state declaring title in such person.

The method of examining titles by means of the record and the abstracts has seemed cumbersome and wasteful to many persons. Suppose that A buys land in the year 1912. He must have his attorneys examine the title notwithstanding this title may have been examined many times in years past by other attorneys and their opinions given thereupon. Notwithstanding all this examination and bringing down of abstracts there is nothing of record, nothing of legal effect, which states just in whom title is. It was therefore questioned why there might not be a

system of *registering* the title and having the state *declare* by certificate that a certain person at a certain date is the legal owner thereof, subsequent transfers being registered and new certificates issued. In 1858 Robert R. Torrens introduced a bill in the Australian Legislature providing for the registration of real estate. This law has been adopted in modified form in England, Ireland, Canada, and some of the States and Territories of the United States, namely, Illinois, California, Massachusetts, Oregon, Minnesota, Colorado, Washington, the Philippine Islands and Hawaii.

It is said that there are three basic elements in the Torrens system: first a registered *title;* second, a *governmental declaration of the ownership and condition of title,* and third, *a title which may not be disputed.*

The registration of title is really the beginning of a suit to have the title settled and declared to be in a certain person.

Sec. 220. EXTENT AND SUCCESS OF THE TORRENS SYSTEM. The Torrens system has not been widely adopted and has never been generally successful in the sense that it has very materially decreased the other mode of conveying real estate.

The idea of the Torrens System appears to be excellent but it has had strenuous opposition and has not had the success in most states that its vouchers have hoped for. It is, however, comparatively new in this country, the first act having been passed in Illinois in 1895. It is hardly the province of this book to go largely into this doctrine and the whole matter is now in such a state that a prediction of its future extent and value would be a mere matter of opinion. For a detailed consideration of this subject

the reader is referred to the book cited in the foot note. That author makes the following statement: "It may be said with confidence that neither the Torrens system nor the recording system is so complex, insecure, slow or costly as to depreciate the natural value of land. Each system possesses, perhaps with some varying degree, all the necessary elements of a practical and successful method of conveying and dealing with land. In the present state of our constitutional law, the Torrens system in this country can never produce what it purports to effect, namely, a conclusive certificate of an indefeasible title in the registered owner, and can never be made so simple and secure as the foreign systems. The natural and logical effect of our laws is the development of title insurance, a guaranteed certificate of title, and not the development of a certificate of ownership of an indefeasible title to land, issued by the state. Such is the opinion of many thoughtful persons who are equipped to judge of such matters. But the progress of the Torrens system in this country is not to be impeded by mere adverse opinion as to its adaptability to our laws. A large part of the people in several states desire to have it tried, and the trial is now on. It is useless for its advocates to gain little advantages for it from state legislatures, and it is equally useless for its opponents to throw obstacles in its way. This trial is to be a fair one, it is to be conducted patiently and slowly, and it will not be concluded until the success or failure of the system is demonstrated."

D. Remedies of the Purchaser and Seller.

Sec. 221. IN GENERAL. The purchaser of real estate has two general remedies where the seller refuses to convey according to the contract.

Considering now the case of a purchaser of real estate under a contract of sale which has not been carried out by the seller, that is, where no deed has been given by him, we may say that his remedy is either to sue for damages or to have specific performance. We know that in the ordinary case of a breach of contract there may be only a suit for damages but that in some classes of cases a court of equity will compel *specific performance,* that is, the carrying out of the contract as agreed upon. Sales of real estate constitute one of these classes.

Sec. 222. THE BUYER'S REMEDY OF SPECIFIC PERFORMANCE. A purchaser of real estate may compel the seller to give him the deed where the contract has been fair and the purchaser has done his part.

If the purchaser desires he may appeal to a court of equity where the seller refuses to give him a deed and have a decree of specific performance. He must in such a case show that he is not guilty of a breach of the contract and he must furthermore show that he has not driven a hard bargain. In case he has made an unjust contract the court will leave him to his remedy in an action for damages, yet the court will not refuse him specific performance for the simple reason that he has obtained a good bargain if there has been nothing unconscionable in his bargain.

If the seller's title is defective but the buyer is willing to take it the buyer may have a decree for specific performance with a sum to be allowed him from the purchase price to offset the defect.

Sec. 223. THE BUYER'S SUIT FOR DAMAGES. The buyer may sue for damages for breach of the contract by the seller and he will be allowed such damages as the seller should have foreseen would result from his breach.

If the buyer desires he may, instead of filing a bill for specific performance, file a suit for damages. Assuming that the buyer is not guilty of a breach of the contract he may have damages for breach by the seller. Damages will be allowed him which he has actually sustained and which the seller should have foreseen from all the circumstances that he would sustain if the contract were broken. These damages might be the difference between the contract price and the market price or there might be damages arising out of special circumstances in any given case.

Sec. 224. THE SELLER'S REMEDY OF SPECIFIC PERFORMANCE. The seller may have specific performance against the buyer.

Just as the buyer may have specific performance, so may the seller on his part have this same remedy in case of a breach by the buyer.

If the seller's remedy is defective he cannot compel the buyer to take it by specific performance because he cannot show that he is not in a condition to perform his part of the agreement but even in such a case it has been held that if the defects are slight the seller may still have specific performance if he allows a sum to offset the defect. In such a case, however, the defect must be trivial as compared with the whole value of the bargain and not of a serious or enduring nature.

Sec. 225. THE SELLER'S SUIT FOR DAMAGES. If the buyer refuses to perform the seller may sue him in damages.

If the seller has performed his part of the agreement or made all proper tenders he may sue the seller for the damages which he has sustained from the loss of the bargain.

APPENDIX A.

FORMS.

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FORMS.

1. Contract of Sale of Real Property.

(The following form which has been filled in by the editor is one of those in use in Cook County, Illinois. It was approved by the Chicago Real Estate Board, February 4, 1903, and is copyrighted. It is printed and for sale by Geo. E. Cole & Co., Chicago.)

THIS MEMORANDUM WITNESSETH, That James Brown hereby agrees to purchase at the price of ten thousand ($10,000) dollars, the following described real estate, situated in the County of Cook and State of Illinois: Lot 1, in block 2, in John Doe's Subdivision of the Northwest quarter of the Southwest quarter of section No. 18, Township 39 North, Range 14 East of Third Principal Meridian, and Walter Johnson agrees to sell said premises at said price, and to convey to said purchaser a good and merchantable title thereto, by general Warranty Deed, with release of dower and Homestead rights, but *subject* to: (1) existing leases, expiring April 30, 1912, the purchaser to be entitled to the rents from the date hereof; (2) all taxes and assessments levied after the year 1912; (3) any unpaid special taxes or special assessments levied for improvements not yet completed and to unpaid installments of special assessments which fall due after the date hereof levied for improvements completed; also subject to any party wall agreements of record; to building line restrictions and building restrictions of record; (here may be filled in any other encumbrances to which subject). Premiums on insurance policies held by Mortgagees shall be paid for by said first party pro rata for the unexpired time. Such purchaser has paid one hundred ($100.00) dollars, as earnest money, to be applied on such purchase when consummated, and agrees to pay within five days after the title has been examined and found good, or accepted by him, said insurance premium

and the further sum of four thousand, nine hundred ($4,900) dollars, at the office of John Smith, Chicago, provided a good and sufficient general Warranty Deed, conveying to said purchaser a good and merchantable title to said premises (subject as aforesaid), shall then be ready for delivery. The balance to be paid as follows: Five thousand dollars on January 15, 1915, with interest from the date hereof at the rate of six per cent per annum, payable semi-annually, to be secured by the purchaser's notes and mortgage, or trust deed, of even date herewith, on said premises, in the form known as the CHICAGO REAL ESTATE BOARD FORM, for improved property.

A Certificate of Title issued by the Registrar of Titles of Cook County, or complete merchantable Abstract of Title, or merchantable copy, brought down to date hereof, or merchantable title Guaranty Policy, shall be furnished by the vendor within a reasonable time, which abstract shall, upon the consummation of this sale, remain with the vendor, or his assigns, as part of his security, until the deferred installments are fully paid. The purchaser or his attorney if an abstract or copy be furnished shall, within ten days after receiving such abstract, deliver to the vendor or his agent (together with the abstract), a note or memorandum in writing, signed by him or his attorney, specifying in detail the objections he makes to the title, if any; or if none, then stating in substance that the same is satisfactory. In case material defects be found in said title, and so reported, then if such defects be not cured within sixty days after such notice thereof, this contract shall, at the purchaser's option, become absolutely null and void, and said earnest money shall be returned; notice of such election to be given to the vendor; but the purchaser may nevertheless elect to take such title as it then is, and in such case the vendor shall convey, as above agreed; provided, however, that such purchaser shall have first given a written notice of such election, within ten days after the expiration of the said sixty days, and tendered performance hereof on his part. In default of such notice of election to perform, and accompanying tender, within the time so limited, the purchaser shall, without further action by either party, be deemed to have abandoned his claim upon said premises, and thereupon this contract shall cease to have any force or effect as against said premises, or the title thereto, or any right or interest therein, but not otherwise.

Should said purchaser fail to perform this contract promptly

on his part, at the time and in the manner herein specified, the earnest money paid at above, shall, at the option of the vendor, be retained by the vendor as liquidated damages and this contract shall thereupon become and be null and void. Time is of the essence of this contract, and of all the conditions hereof.

The notices required to be given by the terms of this agreement shall in all cases be construed to mean notices in writing, signed by or on behalf of the party giving the same, and the same may be served either upon the other party or his agent.

If the taxes and assessments to be paid by the vendor cannot be paid at the time this contract is to be closed then the vendor is to pay same on or before May 1st, next ensuing.

This contract and the said earnest money shall be held by John Smith for the mutual benefit of the parties concerned, and after the consummation of the sale he shall be at liberty to retain the cancelled contract permanently; and it shall be the duty of said John Smith in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expenses incurred for the vendor by his agent in said matter, and second, to the payment to vendor's broker of a commission of five per cent on the selling price herein mentioned, for his services in procuring this contract rendering the overplus to the vendor.

WITNESS the hands of the parties hereto, this 2nd day of January, A. D. 1912*.

....
....
....

2. Opinion of Title.

WILLIAM H. JONES
ATTORNEY AND COUNSELOR AT LAW
25 North Dearborn Street
CHICAGO

Mr. Alfred W. Bays,
Chicago, Ill.

Dear Sir:

I have examined the abstract of title to the property described as

Lot 14 in Block 1 in Brown's Addition, to Jonesboro village.

*This form (here filled up by the author of this volume), copyright 1903 by the Chicago Real Estate Board.

Said abstract consisting of

(1) Printed copy of forty-four (44) pages, certified to be a true copy by the Chicago Title and Trust Co., from the government of the United States to March 18, 1874.

(2) A continuation of ten pages consisting of a printed copy certified by the Chicago Title and Trust Co., from March 18, 1874 to October 27, 1894.

(3) A second continuation of 4 pages by the Chicago Title and Trust Co., from October 27, 1894 to June 4, 1902.

(4) A third continuation by the Chicago Title and Trust Co., consisting of 3 pages covering the dates from June 4, 1902 to April 4, 1903.

(5) A fourth continuation by the Chicago Title and Trust Co., consisting of one page, covering the dates from April 4, 1903 to May 4, 1902.

(6) A fifth continuation by the Chicago Title and Trust Co., consisting of 3 pages covering the dates from May 4, 1903 to December 29, 1905.

(7) A sixth continuation by the Chicago Title and Trust Co., of 2 pages covering the dates from December 29, 1905 to November 11, 1909.

(8) A seventh continuation by the Chicago Title and Trust Co., of 3 pages covering the dates from November 11, 1909 to June 9, 1912.

And from such examination I am of the opinion that the title to said property on June 4, 1912, was in

JOHN DOE

subject to the following:

First: A trust deed dated June 12, 1911 and recorded June 19, 1911, in book 11245 at page 356, signed by William Smith and Nellie Smith, husband and wife, to William H. Jones as trustee to secure their note bearing even date therewith for eight hundred and eighty dollars ($880.00) payable to the order of themselves (and by them endorsed and delivered) on or before three years after date with interest at 5½% per annum payable semi-annually and 7% per annum after maturity.

Second: A special assessment for a system of sewers levied for ($38.80) thirty-eight dollars and eighty cents, payable in twenty annual installments confirmed December 15, 1906, all of the installments which are due having been paid.

Third: Rights of parties in possession, question of error of survey, claims for liens where no notice has been filed of record.

Fourth: Taxes for the year 1912.

Very truly yours,

WILLIAM H. JONES.

3. Warranty Deed—Statutory Form. (Illinois.)

THIS INDENTURE WITNESSETH, that the Grantor ....

....

of the............................in the County of..........
and State of...................................for and in
consideration of the sum of...............................
Dollars, in hand paid, Convey... and Warrant... to..........
....

....

of the...........................County of.......and State
of................the following described Real Estate, to wit:
....

....

....

....

situated in the..............of................in the County
of.....................in the State of..................hereby
releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State.

....

....

....

....

Dated, This.................day of.............A. D. 191...

..............................(SEAL)

..............................(SEAL)

..............................(SEAL)

..............................(SEAL)

State of.......................}
County of.....................} ss.

I, ...
...........................in and for said County, in the

State aforesaid, Do HEREBY CERTIFY, That....................
....
....
personally known to me to be the same person...whose name ....subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that...he... signed, sealed and delivered the said instrument as............ free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN Under my hand and........................seal, this ....day of................A. D. 190...

....

4. Deed—Statutory Form. (New York.)

NEW YORK: Statutory Form of Deed with full Covenants.

This indenture, made the...............Day of........... in the year nineteen hundred and............, between........., of (insert residence), of the first part, and............, of (insert residence), of the second part, witnesseth: That the said party of the first part, in consideration of...................dollars, lawful money of the United States, paid by the party of the second part, his heirs and assigns forever (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part doth covenant with said party of the second part as follows:

First. That the party of the first part is seized of the said premises in fee simple, and has good right to convey the same.

Second. That the party of the second part shall quietly enjoy the said premises.

Third. That the premises are free from incumbrances.

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title of said premises.

Fifth. That the party of the first part will forever warrant the title to said premises.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

In the presence of...................................

....

(Acknowledgment before Notary Public.)

5. Quitclaim Deed—Statutory Form. (Illinois.)

THIS INDENTURE WITNESSETH, That the Grantor ....
of the......................in the County of................
and State of.........................for the consideration of .... Dollars,
Convey...and Quit-Claim...to................................ ....
of the......................in the County of...........and State of........................all interest in the following described Real Estate, to-wit:...................................... ....
situated in the County of........................in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois.

WITNESS the hand...and seal...of the said grantor...this ....day of..................A. D. 191...

............................(SEAL)
............................(SEAL)
............................(SEAL)
............................(SEAL)

(Acknowledgment before Notary Public or other officer; see form 3.)

6. Form of Acknowledgment for Corporation.

State of Illinois }
} ss.
County of Cook }

On this..............day of....................., 19.....
before me appeared....................and............., both to me personally known, who being duly sworn, did say that he, the said..........................., is president, and he, the said......................., is the.............secretary of.........................., the within named corporation, and that the seal affixed to said instrument is the corporate seal

of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said..............and..............acknowledged said instrument to the free act and deed of said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this, the day and year first in this, my certificate, written.

....
Notary Public in and for said County and State.

7. Mortgage—Statutory Form. (Illinois.)

THIS INDENTURE WITNESSETH, That the Mortgagor .... of the......................in the County of...........and State of.......................Mortgage...and Warrant...to .... of the County of..............................and State of ....to secure the payment of...........certain promissory note..., executed by........................... bearing even date herewith, payable to the order of............ .... the following described Real Estate, to-wit:................. .... situated in the County of.............in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State.

....
....
....

Dated, This.............day of................A. D. 19....

..........................(SEAL)
..........................(SEAL)
..........................(SEAL)
..........................(SEAL)

(Acknowledged; see form 3.)

8. Assignment of Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That......
....
....
the part...of the first part, in consideration of the sum of
.... Dollars,
lawful money of the United States of America, to..............
in hand paid by..
....
the part...of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has.....granted, bargained, sold, assigned, transferred and set over, and by these Presents, do...grant, bargain, sell, assign, transfer and set over unto the said part...of the second part ....heirs, executors, administrators and assigns, a certain INDENTURE OF MORTGAGE, bearing date the..............................day of..in the year One Thousand Nine Hundred..................made by........
....
and all................right, title and interest to the premises therein described, as follows, to-wit:
....
....
....
....
which said Mortgage is recorded in the Recorder's Office of the County of..................................in the State of................................in Book No...............
of..................at page..................

TOGETHER with the ....therein described, and the money due or to grow due thereon with the interest, *To have and to hold* the same unto the said part... of the second part,..............................executors, administrators, or assigns, FOREVER:..........................
....
....
....
subject only to the provisos in the said Indenture of Mortgage contained:

AND...............do, for ....heirs, executors, administrators, covenant with the said part...of the

second part,....................................heirs, executors, administrators and assigns, that there is now actually.......... ....owing on said.................. and Mortgage, in principal and interest,............................ Dollars, and that................have good right to assign the same:

AND..................do hereby make, constitute and appoint the said part...of the second part..............true and lawful Attorney, irrevocably, in................name..., or otherwise, but at..................own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest, and, in case of payment, to discharge the same as fully as..............................might, or could do, if these Presents were not made.

IN WITNESS WHEREOF,.....................have hereunto set ....hand...and seal..., this................ day of...........................in the year One Thousand Nine Hundred......................................

SEALED AND DELIVERED
IN PRESENCE OF
....

........................(SEAL)
........................(SEAL)

(Acknowledged, see form 3.)

9. Power of Sale in Mortgage or Trust Deed.

This grant is intended as a security for the payment of the sum of..................dollars, in.........................years from the date of these presents, with interest thereon at the rate of..................per cent, per annum, according to the condition of a bond this day executed and delivered by the said ....party of the first part, to the said party of the second part; and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, it shall be lawful for the party of the second part, his executors, administrators, or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all the moneys arising from such sale to

retain the amount then due for principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

10. Trust Deed—Statutory. (Under Illinois Law of 1879.)

THIS INDENTURE WITNESSETH, That the Grantor, ... of the..................in the County of............and State of.............................for and in consideration of the sum of...Dollars, in hand paid, CONVEY...AND WARRANT...to............ ....of the ....County of......................and State of......................the following described Real Estate, to-wit: .... situated in the County of.......................in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois, and all right to retain possession of said premises after default in payment or a breach of any of the covenants or agreements herein contained, in trust, nevertheless, for the following purposes:

WHEREAS, The said............Grantor...herein............ justly indebted upon.......................Promissory Note... bearing even date herewith, payable to the order of........... ....

Now, if default be made in the payment of the said——— Promissory Note...or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained then and in such case the whole of said principal sum and interest, secured by the said...............Promissory Note..., shall thereupon, at the option of the legal holder or holders thereof, become im-

mediately due and payable; and on the application of the legal holder of said Promissory Note..., or either of them, it shall be lawful for the said Grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, issues and profits thereof; and in his own name, or otherwise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part,...............heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purpose herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and...Dollars attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at 7 per cent per annum, then to pay the principal sum of said note..., whether due and payable by the terms thereof or the option of the legal holder thereof, and interest due on said note...up to the time of such sale, rendering the overplus, if any, unto the said party of the first part,............legal representatives or assigns, on reasonable request, and to pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

WHEN, The said note...and all expenses accruing under this Trust Deed shall be fully paid, the said Grantee or his successor or legal representatives shall re-convey all of said premises remaining unsold to the said Grantor...or..............heirs or assigns upon receiving his reasonable charges therefor. In case of the death, resignation, absence, removal from said........... County, or other inability to act of said Grantee................ then..........................of said.............is hereby appointed and made successor in trust herein, with like power and authority, as is hereby vested in said Grantee. It is agreed that said Grantor shall pay all costs and attorney's fees incurred or paid by said Grantee or the holder or holders of said note...

in any suit in which either of them shall be plaintiff or defendant, by reason of being a party to this Trust Deed, or a holder of said note..., and that the same may be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof.

WITNESS, The hand...and seal...of said Grantor...this..... ....day of..............A. D. 190...

..............................(SEAL)

..............................(SEAL)

(Acknowledged, see form 3.)

11. Long Form of Trust Deed. (Illinois.)

THIS INDENTURE, Made this........................day of.............................in the year of our Lord, One Thousand Nine Hundred and...................A. D. 19... between ....party of the first part and the

CHICAGO TITLE AND TRUST COMPANY,

a corporation created and existing under the laws of the State of Illinois and doing business in the City of Chicago, County of Cook and State of Illinois, party of the second part, as TRUSTEE, as hereinafter specified, witnesseth:

THAT, WHEREAS the said.................................. ....justly indebted to the legal holder or holders of the Principal Promissory Note hereinafter described in the PRINCIPAL SUM of.......................................DOLLARS, secured to be paid by the one certain Principal Promissory Note of the said ....bearing even date herewith, made payable to the order of...........................and by.............. duly endorsed and delivered, in and by which said Principal Note the said..........................promise..to pay the sum of ....Dollars, in ....years after the date thereof, with interest thereon until maturity at the rate of................per centum per annum, payable semi-annually,

on the..........................day of................and of ....in each year, which said several installments of interest until the maturity of said principal sum are further evidenced by......................interest notes or coupons of even date herewith; all of said principal and interest notes bearing interest after maturity at the highest rate for which it is now in such case lawful to contract, and all of said principal and interest payments being made payable in gold coin of the United States of America of the present standard of weight and fineness, at such Banking House in the said City of Chicago, as the legal holder or holders of said principal note may from time to time, in writing appoint, and in default of such appointment, then at the office of the CHICAGO TITLE AND TRUST COMPANY, in said City of Chicago; in and by which said principal note it is agreed that if default be made in the payment of any one of the installments of interest thereon, and such default shall continue for thirty days after such installment becomes due and payable as aforesaid, then, at the election of the legal holder or holders of said principal note, the said principal sum secured thereby, together, with the accrued interest thereon, shall at once become due and payable; said election to be made at any time after the expiration of said thirty days, without notice.

THE IDENTITY of said principal note is evidenced by the certificate thereon of said Trustee.

NOW, THEREFORE, the said party of the first part, for the better securing of the payment of the said principal sum of money and said interest, and the performance of the covenants and agreements herein contained by the said party of the first part to be performed, and also in consideration of the sum of One Dollar in hand paid, the receipt whereof is hereby acknowledged, does by these presents CONVEY AND WARRANT unto the said party of the second part its successors and assigns, the following described Real Estate, situate, lying and being in the.................... COUNTY OF COOK AND STATE OF ILLINOIS, to-wit:.............

....

....

....

....

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof; and all apparatus and fixtures of every kind for the purpose of supplying or distributing heat, light, water or

power, and all other fixtures in, or that may be placed in any building now or hereafter standing on said land, and also all the estate, right, title and interest of the said party of the first part of, in and to said premises.

TO HAVE AND TO HOLD the above described premises, with the appurtenances and fixtures, unto the said party of the second part, its successors and assigns, forever, for the purposes, uses and trusts herein set forth, free from all rights and benefits under and by virtue of the Homestead Exemption Laws of the State of Illinois, which rights and benefits are hereby expressly released and waived.

AND SAID PARTY OF THE FIRST PART, for said party, and for the heirs, executors, administrators and assigns of said party, does covenant and agree with the said party of the second part, for the use of the holder or holders of said principal note, until the indebtedness aforesaid shall be fully paid, to keep said premises in good repair and not to suffer any part of said premises to be sold or forfeited for any tax or special assessment whatsoever, or suffer any lien of mechanics or materialmen to attach to said premises nor do, nor permit to be done, upon said premises, anything that may impair the value thereof, or the security intended to be effected by virtue of this instrument; and in case of failure of said party of the first part thus to pay such taxes or special assessments before the commencement of the annual tax sale in said county, or to keep the buildings on said premises in good repair, or to pay any such liens of mechanics or material men, then said party of the second part, or the holder or holders of said principal note, may at his or their option, pay such taxes or special assessments, or redeem said premises from any tax sale, or purchase any tax title obtained, or that shall be obtained thereon; and said party of the second part, or the holder or holders of said principal note may, at any time, pay or settle any and all suits or claims for liens of mechanics or material men, or any other claims that may be made against said premises, or make repairs to said premises; and all moneys paid for any such purpose, and any other moneys disbursed by the party of the second part or the legal holder or holders of said principal note to protect the lien of this Trust Deed, with interest thereon at the highest rate for which it is now in such case lawful to contract, shall become so much additional indebtedness secured by this Trust Deed, and be paid out of the rents and proceeds of sale of the lands and premises aforesaid, if not otherwise paid by

said party of the first part; and it shall not be obligatory to inquire into the validity of such tax deeds, taxes or special assessments, or of sales therefor, or of liens of mechanics or material men, or into the necessity of such repairs, in advancing, moneys in that behalf as above authorized; but nothing herein contained shall be construed as requiring the said party of the second part, or the legal holder or holders of said principal note, to advance or expend money for taxes or special assessments, or for other purposes aforesaid.

AND AS ADDITIONAL SECURITY for the payment of the indebtedness aforesaid, the said party of the first part, for said party, and for the heirs, executors, administrators and assigns of said party, covenants and agrees to keep all buildings and fixtures that may be upon the said premises, at any time during the continuance of the said indebtedness, insured against loss or damage by fire, for the full insurable value of such buildings and fixtures, in such responsible insurance company or companies as may be approved by the party of the second part, or the holder or holders of said principal note, and to make all sums recoverable upon such policies payable to the party of the second part, for the benefit of the holder or holders of said principal note, by the usual mortgagee or trustee clause to be attached to such policies, except in case of sale under foreclosure hereof, from which time and until the period of redemption shall expire, the same shall be made payable to the holder of the certificate of sale, and to deliver all such policies to the said party of the second part, or the holder or holders of said principal note, and in case of failure to insure as above provided, the party of the second part, or the holder or holders of said principal note, may procure such insurance, and all moneys paid therefor, with interest thereon at the highest rate for which it is now in such case lawful to contract, shall become so much additional indebtedness secured by this Trust Deed; but it shall not be obligatory upon said party of the second part, or any holder of said note, to advance or pay for such insurance in case of such failure to insure.

AND IT IS FURTHER COVENANTED AND AGREED, that in case of default for thirty days in making payment of any of said notes, or any installment due in accordance with the terms thereof, either of principal or interest or of a breach of any of the covenants or agreements herein contained to be performed by the party of the first part, or the heirs, executors administrators or

assigns of said party then the whole of said principal sum hereby secured shall at once at the option of the holder or holders of said principal note, become immediately due and payable, without notice to said party of the first part, or the heirs, legal representatives. or assigns of said party.

And thereupon the legal holder or holders of said principal note, or the party of the second part, for the benefit of the legal holder or holders of said note, shall have the right to immediately foreclose this Trust Deed, and upon the filing of any bill for that purpose, the court in which such bill is filed may at once, and without notice to the said party of the first part, or any party claiming under said party, appoint a receiver for the benefit of the legal holder or holders of the indebtedness secured hereby, with power to collect the rents, issues and profits of the said premises, during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree foreclosing this Trust Deed, shall expire.

AND IN CASE OF FORECLOSURE of this Trust Deed, in any court of law or equity, a reasonable sum shall be allowed for the solicitors' and stenographers' fees of the complainant in such proceeding, and also all outlays for documentary evidence and the cost of a complete abstract of title to said premises, and for an examination of title for the purpose of such foreclosure; and in case of any other suit, or legal proceeding, wherein the said party of the second part, or the holder or holders of said principal note, shall be made a party thereto by reason of this deed the reasonable fees and charges of the attorneys or solicitors of the party of the second part and of the holder or holders of said principal note so made parties for services in such suit or proceeding shall be a further lien and charge upon the said premises, under this deed; and all such attorneys', solicitors' and stenographers' fees and other charges shall become so much additional indebtedness secured by this Trust Deed, and be paid out of the proceeds of the sale of said premises, or from rents, as other costs, if not paid by said party of the first part.

And out of the proceeds of any sale, under foreclosure of this Trust Deed, shall be paid: First—All the costs of such suit or suits, advertising, sale and conveyance, including attorneys', solicitors', stenographers', trustees' fees, outlays for documentary evidence and cost of said abstract and examination of title. Second—All the moneys advanced by the party of the second part, or any one or more of the holders of said principal note,

for any purpose authorized in this Trust Deed, with interest on such advances at the highest rate for which it is now in such case lawful to contract. Third—All the accrued interest remaining unpaid on the indebtedness hereby secured. Fourth—All of said principal money remaining unpaid. The overplus of the proceeds of sale, if any, shall then be paid to the said party of the first part, or the heirs, legal representatives or assigns of said party, on reasonable request.

A RECONVEYANCE of said premises shall be made by the party of the second part, to said party of the first part, or to the heirs or assigns of said party, on full payment of the indebtedness aforesaid, the performance of the covenants and agreements herein made by the party of the first part, and the payment of the reasonable fees of the said party of the second part.

It is expressly agreed that neither the said Trustee, nor any of its agents or attorneys, nor the holder or holders of any note hereby secured, shall incur any personal liability on account of anything that it, he or they may do or omit to do under the provisions of this deed, except in case of its, his or their own gross negligence or misconduct.

In case of the inability or refusal to act of the said party of the second part at any time when its action hereunder may be required by any person entitled thereto, then..................
.................................of said Cook County, shall be and....................is hereby appointed and made successor in trust to the said party of the second part under this Trust Deed, with identical powers and authority, and the title to said premises shall thereupon become vested in such successor in trust for the uses and purposes aforesaid.

....
....
....
....
....
....

WITNESS the hand..and seal..of said party of the first part, the day and year first above written.

........................(SEAL)
........................(SEAL)
........................(SEAL)
........................(SEAL)

State of...................... }
ss.
County of.................... }

I, ...
A NOTARY PUBLIC in and for said County, in the State aforesaid, DO HEREBY CERTIFY That.....................................
....
personally to me known to be the same person........whose name....................................subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that.............................signed, sealed and delivered the said Instrument as..................free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN under my hand and Notarial Seal this............ day of..............................A. D. 19...

....
Notary Public.

The principal note mentioned in the within Trust Deed has been identified herewith.

Register No.......................

CHICAGO TITLE AND TRUST COMPANY, Trustee,

By ....

IMPORTANT For the protection of both the borrower and lender, the principal note secured by this Trust Deed should be identified by the CHICAGO TITLE AND TRUST COMPANY, Trustee, before the Trust Deed is filed for record.

12. Principal Trust Deed Note.

$5,000 Chicago, Illinois, Jan. 15, 1912.

Three years after date for value received, we promise to pay to the order of ourselves the principal sum of Five thousand ($5,000) dollars, in gold coin of the United States of America of the present standard of weight and fineness, with interest thereon until the maturity hereof at the rate of six per centum per annum, payable in like gold coin, on the fifteenth day of

January and of July in each year, and with interest after maturity until paid at the highest rate for which it is now in such case lawful to contract; which said several installments of interest until the maturity of said principal sum are further evidenced by six (6) interest notes or coupons of even date herewith, with interest after due at the highest rate for which it is now in such case lawful to contract, payable in like gold coin, and the said payments of both principal and interest are to be made at such Banking House in the City of Chicago, in the State of Illinois, as the legal holder or holders of this principal note may, from time to time, in writing appoint, and in default of such appointment, then at the office of the CHICAGO TITLE AND TRUST COMPANY, in said City of Chicago.

It is hereby agreed that if default be made in the payment of any one of the installments of interest aforesaid, at the time and place when and where the same becomes due and payable as aforesaid, and such default shall continue for thirty days after such installment becomes due and payable as aforesaid, then at the election of the legal holder or holders hereof, the said principal sum, together with the accrued interest thereon, shall at once become due and payable at the place of payment aforesaid; said election to be made at any time after the expiration of said thirty days without notice. The payment of this note is secured by Trust Deed, bearing even date herewith, to the CHICAGO TITLE AND TRUST COMPANY, Trustee, on real estate in the County of Cook and State of Illinois.

Principal Note No. 1.

This is to certify that this is.... the Principal Note....described in a Trust Deed to Chicago Title and Trust Company, Trustee, dated........ *Register No....* *Chicago Title and Trust Company, Trustee* *By ....*	JAMES BROWN. NELLIE BROWN. ....

(Endorsed on back "James Brown, Nellie Brown.")

13. Coupon Trust Deed Note.

$.................... Chicago, Illinois, Jan. 15, 1912.

We promise to pay to the order of ourselves, one hundred fifty ($150) dollars in gold coin of the United States of America, of the present standard of weight and fineness, on the 15th day of July, A. D. 1912, at such Banking House in the City of Chicago, in the State of Illinois, as the holder or holders of the principal note hereinafter mentioned may from time to time in writing appoint, and in default of such appointment, then at the office of the CHICAGO TITLE AND TRUST COMPANY in said City of Chicago, with interest, after maturity, until paid, at the highest rate for which it is now in such case lawful to contract, being for an installment of interest on our principal note of even date herewith, for the sum of $5,000. The payment of this note is secured by Trust Deed to the Chicago Title and Trust Company, Trustee, on real estate in Cook County, Illinois.

Coupon No. 1.

JAMES BROWN.
NELLIE BROWN.

....

....

(Endorsed on back by the makers.)

14. Another Form of Principal Note.

$......................... ....19..

....after date, for VALUE RECEIVED, ...Promise to pay to the order of...................................... the principal sum of..................................Dollars, with interest thereon at the rate of......................per cent per annum, payable............................yearly, to-wit: on the........................... day of............and of ....in each year, until said principal sum is fully paid. Both principal and interest are payable at...

The several installments of interest, aforesaid, for said period, ...are further evidenced by..................................interest notes or coupons, of even date herewith.

It is further expressly agreed, that, if default be made in the payment of any one of the installments of interest aforesaid, at

the time and place aforesaid, when and where the same becomes due and payable, and such default shall continue for............ ....days after such installment becomes due and payable, as aforesaid, then, and in that event, the said principal sum of...Dollars shall, at the election of the legal holder hereof, at once become and be due and payable, anything hereinbefore contained, to the contrary notwithstanding; such election to be made at any time after the expiration of said............days, without notice.

The payment of this note is secured by.................... on real estate in..

No......................... . ...

....

15. Release Deed.

KNOW ALL MEN BY THESE PRESENTS, That I, William H. Jones, trustee, and holder of the note secured by the trust deed hereinafter described of the County of Cook and State of Illinois, for and in consideration of one dollar, and for other good and valuable consideration, the receipt whereof is hereby confessed, do hereby remise, convey, release, and quitclaim, unto James Brown, and Nellie Brown, his wife, of the County of Cook and State of Illinois, all the right, title, interest, claim, or demand whatsoever I may have acquired in, through, or by a certain Trust Deed bearing date the 29th day of December A. D. 1905 and recorded in the Recorder's Office of Cook County, in the State of Illinois in Book 8923 of Records page 47 as Document No. 3801805 to the premises therein described as follows, to-wit: Lots thirteen (13) and fourteen (14) in block one (1) in Dingee's Addition to Wilmette Village, according to the plat thereof recorded October 21, 1873, in Book 6 of Plats, Page 26, as Document 131865, in Cook County, Illinois, situated in the County of Cook, in the State of Illinois. Together with all the appurtenances and privileges thereunto belonging or appertaining.

WITNESS my hand and seal this 22nd day of October, A. D. 1910.

WILLIAM H. JONES, Trustee
and holder of the note above described.

State of Illinois }
Cook County, } ss.

I, Walter Johnson, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that William H. Jones, trustee, and owner of the note above described personally known to me to be the same person.... whose name is subscribed to the foregoing Instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses therein set forth.

GIVEN under my hand and notarial seal, this 22nd day of October, A. D. 1910.
WALTER JOHNSON,
Notary Public.

16. Lease—Short Form.

THIS AGREEMENT, Made this....................day of ....A. D. One Thousand Nine Hundred..............................(A. D. 191)...... Between ....
....................................party of the first part,
and ....party of the second part,

WITNESSETH, That the said party of the first part does hereby lease to the said party of the second part, the following described property, situate in the City of Chicago, County of Cook and State of Illinois, viz.:..................................
....
....
....
....
....
....
for the term.......................beginning the........day of....................A. D. 191.., and ending the....... day of....................................A. D. 191..

And the party of the second part agrees to pay as rent for said premises the sum of..................................
......................................Dollars, payable ....in payments of............... Dollars each, to-wit:..................................
....
....

AND the party of the second part covenants with the party of the first part, that at the expiration of the term of this lease he will yield up the premises to the party of the first part without further notice, in as good condition as when the same were entered upon by the party of the second part, loss by fire or inevitable accident, and ordinary wear excepted; and will pay all assessments that shall be levied upon said premises during said term for water tax.

And the said party............of the second part further covenant....that..................will permit the party of the first part to have free access to the premises hereby leased for the purpose of examining or exhibiting the same, or to make any needful repairs or alterations of such premises, which said first party may see fit to make; also to allow to have placed upon said premises, at all times, notice of "For Sale" or "For Rent" and will not interfere with the same.

IT IS FURTHER AGREED, by the said party of the second part that neither he nor....................................legal representatives will underlet said premises, or any part thereof, or assign this Lease, or make any alterations, amendments or additions to the buildings on said premises, without the written assent of the party of the first part had thereto, and that neither he nor..........................legal representatives will use said premises for any purpose calculated to injure or deface the same, or to injure the reputation or credit of the premises or of the neighborhood.

It is further agreed by the party of the second part that he will keep said premises in a clean and healthy condition, in accordance with the ordinances of the City, and the directions of the Board of Health and Public Works.

....

....

....

....

....

AND IT IS FURTHER EXPRESSLY AGREED between the parties, that if default shall be made in the payment of the rent above reserved, or any part thereof, or in any of the covenants or agreements herein contained, to be kept by the party of the second part ....heirs, executors, administrators or assigns, it shall be lawful for the party of the first part, or........ legal representatives to enter into and upon said premises, or any

part thereof, either with or without process of law, to re-enter and repossess the same, and to distrain for any rent that may be due thereon, at the election of said party of the first part; and in order to enforce a forfeiture for non-payment of rent, it shall not be necessary to make a demand on the same day the rent shall become due, but a demand and refusal or failure to pay at any time on the same day, or at any time on any subsequent day, shall be sufficient; and after such default shall be made, the party of the second part, and all persons in possession under ....shall be deemed guilty of a forcible detainer of said premises under the statute.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

, ...(SEAL)
, ...(SEAL)
, ...(SEAL)

17. Guarantee of Lessee's Undertakings.

For value received..................hereby guarantee the payment of the rent and the performance of the covenants and agreements of the party of the second part in the within Lease, in manner and form as in said Lease provided.

Witness.........hand......and seal............this.......... day of....................A. D. 19..........

..............................[SEAL]

18. Assignment of Lease and Acceptance Thereof. (To be used by tenant in assigning to another tenant.)

For value received..................hereby assign all........ right, title and interest in and to the within Lease unto.......... ....heirs and assigns and in consideration of the consent to this assignment by the Lessor................guarantee the performance by said................................. of all the covenants on the part of the second party in said Lease mentioned

........................(SEAL)

In consideration of the above assignment and the written consent of the party of the first part thereto.................... hereby assume and agree to make all payments and perform all the covenants and conditions of the within Lease, by said party of the second part to be made and performed.

Witness......................hand..........and seal......this ....day of...........A. D. 19...
........................(SEAL)
........................(SEAL)

19. Consent to Assignment of Lease.

......................hereby consent to the assignment of the within Lease to..................................on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as therein mentioned, and that no further assignment of said Lease or subletting of the premises or any part thereof shall be made without.............written assent first had thereto.

Witness........................hand..and seal..this........ day of..................................A. D. 19.....
........................(SEAL)

20. Lessor's Assignment of Lease. (To be used by owner upon sale of the premises.)

In consideration of One Dollar, to..............in hand paid, ...hereby transfer, assign and set over to ....and assigns.................. interest in the within Lease, and the rent thereby secured........
....

Witness............................hand....and seal....this ....day of................A. D. 19...
........................(SEAL)
........................(SEAL)

21. Will.

I, JOHN DOE, of the City of Chicago, County of Cook and State of Illinois, being of sound and disposing mind and memory do hereby make, ordain, declare and publish this as my last will and testament, hereby revoking all former wills by me made.

First. I direct that my just debts and funeral expenses be paid as soon as conveniently may be after my death.

Second. I give to my faithful employee William Smith, the sum of One Thousand ($1,000.00) Dollars.

Third. I give to my nephew Harry Wilson my gold watch and chain.

Fourth. All the rest and residue of my estate whether real or personal and wherever situated I give devise and bequeath to my beloved wife Mary to have and to hold the same as her own forever.

Sixth. I hereby appoint my wife Mary as the executrix of this my last will and testament and I direct that she be allowed to serve without bond.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this third day of March, 1912.

JOHN DOE (SEAL)

We, the undersigned, hereby certify that the testator, John Doe, made, ordained, published and declared the above instrument, consisting of one page, to be his last will and testament and in our presence signed the same, and we at his request and in his presence and sight, and in the presence and sight of each other hereby sign the same as witnesses thereto believing the said John Doe to be of sound and disposing mind and memory and about the age of fifty-eight years.

ALEXANDER JACKSON,
JOSEPH H. CROSSLEY.

APPENDIX B.

QUESTIONS AND PROBLEMS.

APPENDIX B.

QUESTIONS AND PROBLEMS.

CHAPTER ONE.

1. On what two senses is the word "property" defined? Define "title"; "possession."

2. Define "real property"; "personal property"; give some illustrations. May property be real and personal at the same time?

3. What distinction does the law make as to real and personal property in the case of death of the owner?

4. What difference is there between real and personal property in respect to transfer?

5. What kind of property does a wife have dower in?

6. What other distinctions does the law make?

7. Define "land"; "tenement"; "hereditament."

8. A and B have adjoining lands. A's fruit tree overhangs B's land. Is B entitled to the fruit on his side of the fence? Can he cut off the overhanging branches?

9. Is water "land"?

10. Define "advowson"; "tithes"; "commons"; "ways"; "annuities."

11. What is a chose in action? Chose in possession?

12. Enumerate with short explanation various forms of intangible personal property.

CHAPTER TWO.

13. What was "feudalism."

14. What was enfeoffment?

15. What were the incidents of the feudal estate?

16. What were the three general kinds of tenures?

CHAPTER THREE.

17. In what two ways is the word "fixture" employed?

18. A sold a piece of real estate describing it by its legal description and making no mention of any improvements or fixtures

thereon. The land had upon it a residence, a barn, a rail fence, a stack of hay, some growing corn, a wind mill; and the residence had a mirror built into the panel, a heating system consisting of a furnace and steam pipes and coils; in the house were chairs, beds, tables, and other furniture. On the house was a lightning rod. In the basement were screens for the windows. State which of these things passed by the deed and which did not.

19. A theater building is sold. It contains chairs for the audience, and an organ which had been used in the entertainments. Is the buyer entitled to these items?

20. Do gas fixtures, chandeliers, and gas ranges, go with a sale of the real estate?

21. A buys a house on installments, with the provision that on failure of payment, he may be declared in default, and a forfeiture declared. Before default he had some storm doors put on the house, removable by merely lifting off the same hinges used for the screens in summer time. Has he a right to these doors if he forfeits his title?

22. What is the rule between mortgagor and mortgagee as to annexations?

23. A rents a building from B for the purpose of conducting a restaurant on the first floor and living on the second. On the second floor he places his furniture, fastens a chandelier on the gas system, and puts in a gas range in his kitchen; on the first floor he puts up counters which are fastened to the floors, builds a substantial petition, puts up a telephone booth, and puts an awning over the front show windows. What is he entitled to take away at the end of his tenancy?

CHAPTER FOUR.

24. In what two classes are growing products placed?

25. A owns a farm. During the summer while crops are maturing he sells the property to B, no mention being made of the crops. Is B entitled to them?

26. A sells his crops to B under an oral agreement? A afterwards refuses to go on with the bargain and claims that the sale is unenforceable because a sale of real estate and not in writing. Is it enforceable?

CHAPTER FIVE.

27. A sells B the uncut ice on his land. Is this a sale of real or personal property?

28. What does the text state in reference to rocks and stones?

CHAPTER SIX.

29. Is a promise to make a gift enforceable? Why?

30. What are the two kinds of gifts? What practical distinction between them? Is delivery essential in each case?

31. A tells B that he can have the contents in his trunk, and tells B that he can find the key to the trunk tied to it. B looks for the key and cannot find it. A then tells B that he will have a search made. That night A dies. B claims the contents of the trunk and A's heirs claim them. Who is entitled to them?

32. A goes into a barber shop and while being waited upon leaves a book in the window and goes away forgetting it. B, another customer, comes in, discovers the book and claims it. A is unknown. The barber resists B's claims and brings a suit for the possession of the book. Who is entitled to the book as between A, B, and the barber?

33. Assume in the question above that A had dropped the book upon the floor of C's shop and B had found and claimed it, would your answer be the same?

34. What is treasure trove? To whom does it belong on discovery?

35. How may one acquire title to wild animals? How is such title lost?

36. What is the rule in reference to acquiring title in fish and other marine animals?

37. What do we mean by title by confusion?

38. A has a lot of sheep and by accident they get mixed with B's sheep. Neither A nor B can identify his own sheep. Who owns the sheep?

39. What do we mean by title by accession?

40. A finds a board belonging to B which he takes a fancy to and carries it away and builds it into a carriage. What are B's rights?

41. Assume under the same circumstances that A thought that the board belonged to him, would this make any difference?

CHAPTER SEVEN.

42. What are freehold estates?

43. What two kinds of fees were there at common law?

44. What two general kinds of life estates are there?

45. What were the future estates?

CHAPTER EIGHT.

46. A deeds land to "B and his heirs." What kind of estate has B? Can B sell this land to C, and thereby cut off his own heirs or can they claim that they take under the deed from A? If the deed had been to A and his children, would your answer be the same? In that case would it make any difference whether the children were in fact at A's death all of his heirs?

47. What was the history of the estate in fee simple?

48. What words were necessary to create a fee at common law? Are they still necessary? If a deed was made merely to "John Doe" at common law, what sort of estate did John Doe get?

49. A transfers land to B for life, and after B's death, with remainder to B's heirs. B makes a deed purporting to convey the fee to C. After B's death, his heirs claim the land under the deed from A. Who is right? Why?

50. Suppose in the same case, A had deeded to B and after B's death with remainder to B's children, would your answer be the same? Why?

51. Define and illustrate a "base fee."

52. At early common law before the statute *de donis* if A gave land to B and the heirs of B by his wife Mary, (a) what was the estate called? (b) How could B get the fee? (c) If B did not convey and on his death left no heirs by his wife Mary, where did the estate go? (d) If he did leave such heirs, did they get the estate? (e) What was the purpose of the statute *de donis*? (f) By whose influence was its enactment procured? (g) What was the effect of the gift above described after the statute *de donis*? (h) How did the courts ultimately virtually overcome the effect of that statute?

CHAPTER NINE.

53. Define dower. Can a husband lawfully defeat his wife of dower? Is it necessary that the wife be named as a grantee in the deed in order that she may have dower?

54. How is dower waived? If a wife is divorced, does she thereby lose dower in her husband's real estate?

55. What is assignment of dower?

56. Define curtesy. Was birth of child necessary to curtesy? Dower?

CHAPTER TEN.

57. What is a conventional life estate? What is an estate per auter vie?

58. What use can tenant for life make of the estate?

59. What is waste? Voluntary waste; permissive waste?

60. What is meant by saying a tenant is unimpeachable for waste? What is equitable waste?

61. A tenant for life is about to clear timber off of a part of the land. Can the remainderman prevent?

62. A tenant for life wishes to pull down an old store building and erect a modern skyscraper thereon. Can the remainderman prevent?

63. A is a life tenant. B is lessee of certain of the property with rents payable half yearly on the first of January and July in each year. A dies December 31st. Do the rents go to A's estate, or to the remainderman C?

64. D in his will gives his estate to T as trustee to hold the estate in trust to pay the income during A's life and after A's death to transfer the estate to B. In the trust estate there are some bonds worth 90% of par. These bonds increase in value to par. Who is entitled to increase as between A and B? If A dies between interest days will the interest be apportioned?

65. Who, as between life tenant and remainderman, is entitled to dividends on stock? Suppose the dividends are earned during the life tenancy, but not declared until after his death, is the life tenant's estate entitled?

66. What is liability of life tenant for taxes? For special assessments?

67. Is a life tenant liable for interest on the incumbrances on the estate? The principal?

CHAPTER ELEVEN.

68. Define estate for years; from year to year; estate at will.

69. T has a lease from L for one year. After the year T stays in possession. What rights has L?

70. Suppose in above case L receives rent from T for the first month. He then advises T he will raise the rent. Has he a right to do this?

71. Must there be a written lease to create a tenancy?

72. How is rent usually provided to be payable?

73. A rents a flat which is to be heated by steam by the landlord. The landlord does not furnish heat as agreed. Must A pay the rent? Would he be justified in vacating?

74. What is actual eviction? Constructive eviction? In the latter case must the tenant actually vacate?

75. A rents a house from L. He finds it full of vermin. Will this justify him abandoning the premises?

76. A rents a flat to B and retains care of the halls. He allows them to become dilapidated and B is injured by a loose board. What are B's rights?

77. A rents a house to B under which there is a defective sewer from which gas escapes. A knows of this defect but B does not and B's family are made ill. Has B any right against A?

78. What care must a tenant give to the premises? While a tenant is in possession of the premises they are injured by fire. Must the tenant replace the injury?

79. If a lease expires at a certain day, must either landlord or tenant give notice of termination?

80. If a tenancy is from year to year how can it be terminated? From month to month?

81. If a tenant fails to pay rent, can the landlord terminate the tenancy?

82. A rents a dwelling house from B. It burns down. Does this abate the rent or terminate the lease?

CHAPTER TWELVE.

83. A conveys to B for life with remainder to C and his heirs. What is C's estate called?

84. In the above case, if C is alive does the estate vest in him at once or in futuro? Suppose C dies before B, does this destroy the remainder?

85. What is a contingent remainder?

86. Can there be a remainder without a particular estate? Why?

87. What is the rule against perpetuities?

88. What is meant by an estate in reversion?

89. Define executory devise.

CHAPTER THIRTEEN.

90. Define estate in severalty.

91. A is grantor in a deed, conveying land to B, C and D. What is their title? Is B entitled to partition? Suppose the land cannot be divided to any advantages, what will be done?

92. Suppose in the above case, before partition, B dies, does C, and D get B's title, or does it go to his heirs or devisees?

93. What is a joint tenancy? How does it differ from a tenancy in common?

94. Define estate in coparcenary.

95. What is the estate in entirety?

CHAPTER FOURTEEN.

96. D devises lands to T, to manage the same for benefit of B, paying him the net income. What is this arrangement called. What are T and B respectively called?

97. What was a "use"? What was the Statute of Mortmain? the statute of uses?

98. To what uses was the statute of uses deemed not to apply?

99. Make a table of trusts.

100. Can a trust in real property be declared orally?

101. Testator leaves property to his eldest son, John, stating that he hopes and has full confidence that John will use it to send his brother through college. Can William compel John to carry out his father's hope?

102. Testator leaves a fund to trustees for them and their successors to perpetually hold in trust for the endowment of a hospital. Also another fund for the perpetual care of his grave. Are these trusts valid? Suppose the hospital was to be conducted for profit and the net income paid to named beneficiaries would the trust be valid? Why?

103. What is the *cy pres* doctrine?

104. A trustee has funds to invest. He invests them in stock of a corporation which fails. Is he personally responsible?

What is the general rule as to nature of investment by trustee?

105. Testator gives property to T in trust for B's benefit, providing that B cannot anticipate the income by assignment or pledge. B borrows money from L, assigning his future income under the trust for a stated period. Can L get any judicial relief to prevent B from collecting this income?

106. A buys property with B's funds, and takes title in A's name. What right has B?

107. What is a constructive trust? Give some examples.

CHAPTER FIFTEEN.

108. What is a conditional estate?

CHAPTER SIXTEEN.

109. What was the effect at common law of a failure to pay a debt secured by mortgage?

110. What was the equity of redemption? Why was it allowed?

111. What was foreclosure? How did it fail of justice under the early equitable theory?

112. How is a mortgage foreclosed in modern times.

113. D mortgages his lands to C. Who under modern law has the legal title? Can C convey the legal title? Do D's heirs or C's heirs take the title on death of D or C?

114. What is a trust deed in the nature of the mortgage?

115. A conveyed to B by warranty deed. A now claims that desiring to borrow some money from B, B let him have the same upon the deed being made with an agreement to reconvey to A when the debt should be paid and that B now refuses to reconvey. If A can establish this case by proof will the courts give him any, and if so what relief?

116. What is a power of sale in a mortgage? Is it good?

117. What is the meaning of the phrase "Once a mortgage, always a mortgage"?

118. How may the mortgagee make his mortgage good against third persons subsequently dealing with, or acquiring rights against, the mortgagor?

119. Who is entitled to possession under a mortgage?

120. A sells property to B. The property is subject to a mortgage properly recorded. Can the mortgage be foreclosed as against B? Can B get a deficiency judgment or decree against B? Can A cut off his own personal liability by such a transfer?

121. May the debt secured by mortgage be sold? How is this accomplished?

122. Can the mortgagee eject the mortgagor from possession?

123. Define the kinds of foreclosure.

124. What is meant by statutory right of redemption?

125. Describe a junior mortgage.

CHAPTER SEVENTEEN.

126. If A's land is bounded by a roadway separating his land from that of B, does A own any of the roadway?

127. What was "navigability" at common law for the purpose of determining boundaries?

128. A's land is upon the west bank of the Illinois River. Where is the boundary of his land?

129. Has A a right to prevent B from fishing from his bank? From fishing from a boat floating in the river?

130. Where land borders on a lake where is the boundary line?

131. What is a meander line?

CHAPTER EIGHTEEN.

132. Define an easement.

133. What is a positive easement? A negative easement?

134. Can a person get by prescription an easement to have light come over his neighbor's land?

135. What is an easement in gross? What is meant by dominant estate? Servient estate?

136. What is prescription?

137. What is an easement of necessity?

138. How does an easement differ from a license?

139. A owns lot A and has an easement over lot B for benefit of lot A. He sells lot A to X. Is X entitled to the easement? If owner of lot B sells to Y, does Y take subject to the easement?

140. How are easements lost?

141. What is a profit á prendre? Name the different kinds.

142. A's land adjoins B. B desires to dig out soil and dirt, but this will cause A's land to give way. Can B make the excavation without liability to A? Has B a right to build up an artificial wall to give A the same support? If A has a building on his land, can B make an excavation that would not have affected A's land except for the building? What precaution must he take?

CHAPTER NINETEEN.

143. What is meant by "adverse possession"?

144. What was essential to title by adverse possession at common law?

145. What other periods of limitation have been established by statute?

146. A has adverse possession of X's land for ten years; after A's death, his son B keeps up the adverse possession for another ten years. Can the two periods be tacked together?

147. Define escheat; forfeiture.

148. A's land, which is bordered by the lake, is gradually added to by the deposit of the sand. Who owns the title to this new land?

149. What is erosion?

CHAPTER TWENTY.

150. A wishes to buy land from the X corporation. Is it any concern of his whether the X corporation owned the land for proper corporate purposes?

151. May an alien own real estate?

152. May a minor dispose of his real estate? be grantee in a deed?

153. What capacity had a married woman at common law to own real estate?

CHAPTER TWENTY-ONE.

154. Enumerate and define the old English deeds.

155. What is a warranty deed? A purports to convey Blackacre to B by warranty deed. A does not own Blackacre, but subsequently X, the owner, conveys to A. Has B, without more, good title? Why?

156. What is the effect of a quit claim deed?

157. What is the mission of a release deed?

CHAPTER TWENTY-TWO.

158. A makes a deed to his brother, and it is found among A's effects at his death. His brother did not know the deed had been made out. Has B title by virtue of the deed? Why?

159. What is, and what is the purpose of, delivery in escrow?

160. Is acknowledgment essential to the validity of a deed?

161. Why does the statute provide for acknowledgment of deeds?

162. When will acceptance of a deed be presumed?

163. What is the purpose of recording laws? Are deeds valid without record?

CHAPTER TWENTY-THREE.

164. Does the law permit a seller of real estate to restrict the use thereof by the grantee?

165. What is the difference between a covenant and a condition as to the use of land?

166. A, owning a plat of land, subdivides it into lots and streets, and places a building line restriction on every lot. A sells Lot 1 to M and Lot 2 to N. Can M enforce the restriction as against N?

167. How may a restriction be lost or waived?

CHAPTER TWENTY-FOUR.

168. Define "testator"; "intestate"; "devisee"; "legatee"; "distributee"; "personal representative"; "executor"; "administrator."

169. What is a "canon of descent"? If A dies (a) leaving children; (b) leaving a widow, but no children; (c) leaving no widow or children, but brothers and sisters; describe generally in each case who gets his real estate.

170. What important distinction did the common law make between the course of descent of real and of personal property?

CHAPTER TWENTY-FIVE.

171. What is a holographic will? A nuncupative will?

172. Can a minor make a will?

173. A is an old man in his dotage, unable to carry on his business. Has he capacity to make a will?

174. What is undue influence?

175. A is a believer in spiritualism and in his will makes a gift to a leader in spiritualism. His heirs try to have the gift avoided on the ground that (a) this leader had undue influence over the testator; (b) that testator was a victim of insane delusion; will either contention prevail? What would have to be shown?

176. What is incorporation by reference? State what was held in Bryan's appeal, and why.

177. A made a will and asked B to sign it. B took it into an adjoining room, signed it and brought it back to A. C, the other witness, took the will home and there signed it and brought it back to A, saying, "This is my signature." Is the will properly witnessed by either witness?

178. What is a "residuary" clause?

179. A makes a will giving B a legacy of $1,000. He tells B of this and hands B the will. Before A's death he makes another will attempting to revoke the first will. Has he a right to do this?

180. If a will is lost or destroyed, does that make it inoperative (assuming its contents can be proved)?

181. Does subsequent marriage by a man or woman revoke his or her will? birth of child?

182. If A makes a will and then a second will, does the second necessarily revoke the first?

183. In what other ways may a will be revoked?

CHAPTER TWENTY-SIX.

184. What are "letters of administration"? "letters testamentary"?

185. Who is entitled to act as an executor?

186. May one be an executor who is (a) relative, (b) beneficiary, (c) creditor, (d) witness to will?

187. Must an administrator give bond? an executor?

188. How is heirship established?

189. How is a will proved?

190. What is an inventory? a widow's award?

191. Does an executor get title to real estate of deceased? to personal property?

192. Same question as to an administrator.

193. Is an executor entitled to vote corporate stock belonging to the estate?

194. Does the executor or administrator take title to partnership assets?

195. If life insurance is payable to a named beneficiary, does same constitute assets of the estate?

196. Can the personal representative sue where deceased could have done so?

197. What is the general rule in respect to nature of investment by an executor?

198. In case it is necessary to sell real or personal property to pay debts, which will be sold preferably to the other?

CHAPTER TWENTY-SEVEN.

199. What is the usual practice in the sale of real estate?

200. What is a "merchantable" title?

201. Should a contract to purchase real estate be recorded?

202. What is a meridian line? How many are there?

203. What is a base line? a range line? a township?

204. What is a section? How many acres does it contain?

205. What is an abstract? a guaranty policy?

206. What is the "Torrens' System"?

207. If A has a contract with B whereby A is to sell B real estate, and A will not convey, can B compel him to do so, or must he sue for damages?

INDEX.

INDEX.

(References are to sections.)

A.

B.

(References are to sections.)

C.

D.

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

(References are to sections.)

U.

V.

W.

AMERICAN COMMERCIAL LAW SERIES

Second Edition

The Law of Bankruptcy

CONTAINING TEXT OF

The Federal Bankruptcy Law

WITH ADDED CHAPTERS ON

General Law of Debtor and Creditor

AND

Questions and Problems

BY

ALFRED W. BAYS, B.S., LL.B.

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TABLE OF CONTENTS.

CHAPTER 1.

THE HISTORY AND PURPOSE OF BANKRUPTCY LEGISLATION.

CHAPTER 2.

THE COURTS AND OFFICERS IN BANKRUPTCY.

CHAPTER 3.

WHO MAY BE A BANKRUPT.

A. In Respect to Business or Calling.

(a) *Of natural persons.*

(b) *Of corporations.*

B. In Respect to Legal Status.

C. In Respect to Amount of Indebtedness.

CHAPTER 4.

ACTS OF BANKRUPTCY.

A. Introductory.

B. The Particular Acts of Bankruptcy.

CHAPTER 5.

THE PETITION AND PROCEEDINGS THEREON.

CHAPTER 6.

THE TRUSTEE'S TITLE.

CHAPTER 7.

CLAIMS AGAINST ESTATE.

H. Set Offs.

CHAPTER 8.

DUTIES AND RIGHTS OF BANKRUPTS.

CHAPTER 9.

DISCHARGE.

A. The Discharge of the Bankrupt.

B. Payment and Tender.

C. Settlement and Compromise.

D. Compositions with Creditors.

E. Debtors Exemptions.

(a) *Homestead.*

(b) *Exemptions in personal property.*

(c) *Exemptions in income.*

BANKRUPTCY.

BANKRUPTCY.

CHAPTER 1.

THE HISTORY AND PURPOSES OF BANKRUPTCY LEGISLATION.

Sec. 1. DEFINITION OF BANKRUPTCY. The word "bankruptcy" has a technical meaning to indicate that, under the authority of some statute, a judicial proceeding has been instituted for the collection of a debtor's assets, their distribution among his creditors, and his discharge from personal liability to such creditors notwithstanding the insufficiency of his assets to satisfy their claims in full. A party who is subject to such proceedings is called a bankrupt.

(1) Meaning of word "bankruptcy" as now used.

In the present significance of the word bankruptcy, there is connoted:

(a) A statutory law under which a debtor's assets may be collected for the benefit of his creditors, and the debtor discharged from his indebtedness;

(b) A court proceeding for that purpose begun under the law.

(2) Derivation of term "bankruptcy."

The term bankruptcy probably comes from the Italian words *banca rotta* meaning *broken bench*. The Century dictionary says: "It is said to have been

the custom in Italy to break the bench, or counter, of a money changer upon his failure; but the allusion is probably figurative like *break, crash, smash,* similarly used in English."[1]

(3) "Bankruptcy" and "insolvency" distinguished.

Insolvency signifies a financial condition; inability to pay one's debts; bankruptcy signifies court procedure. Insolvency may not induce bankruptcy, but bankruptcy is usually and in most (but not all) cases predicated upon insolvency.[2]

(4) "Insolvency" laws distinguished from "bankruptcy" laws.

The term insolvency law as used in its larger sense would include any law meant for the relief of an insolvent debtor or his creditors, including a bankruptcy law, but in a narrower sense is sometimes used to indicate laws which do not give a bankrupt discharge from his indebtedness except with consent of his creditors or a percentage of them.[3] State laws relating to insolvent persons are usually called Insolvent Laws. The power of the state to enact such laws, and the effect upon them of federal legislation is considered hereafter.

Sec. 2. HISTORY OF BANKRUPTCY LEGISLATION IN OTHER COUNTRIES. **The earliest known bankruptcy law was a Roman Law in the time of Julius Caesar.**

1. Century Dictionary title, "Bankruptcy"
2. For definition of Insolvency under present law, see Sec. 36 of this text.
3. Sturges v. Crowinshield, 4 Wheat. (U. S.) 122.

Bankruptcy laws are in force in most countries and have been in force in England since 1542.

In ancient times, the laws against insolvent debtors were severe. It is said that under the Roman law, the creditors could put their debtor to death or subject him to bodily torture. In Julius Caesar's time a law (Cessio Bonarum) was passed providing that a debtor could escape punishment by surrendering all of his goods for the benefit of his creditors. It was not a true bankruptcy law, as used in the modern sense. It could not be invoked by creditors.

Bankruptcy laws upon the continent in later times we need not stop to consider. In England, the first bankruptcy law was enacted in 1542, being Statute 34 Henry VIII. Under this act a debtor was still looked upon as in a sense an offender, and the law was mainly for the benefit of creditors, providing for an equal distribution of the debtor's assets among his creditors, but not releasing the debtor from his debts.

The preamble of that law indicates that the justification for it in the minds of the members of the Parliament was that of an *offense* committed in becoming an insolvent debtor, no distinction being taken between those who are unfortunate and those who are dishonest. This law was followed by two other bankruptcy acts until the time of Queen Anne when in 1705 (4th Anne, ch. 17) a bankrupt law was passed providing for the discharge of the debtor from his debts in case he fully surrendered his property for the benefit of creditors. Since this time, the twofold idea of the benefit of the creditor and the benefit of an honest debtor has been prevalent both in English and American Bankruptcy acts.

Sec. 3. LEGISLATIVE JURISDICTION OF THE SUBJECT OF BANKRUPTCY IN THE UNITED STATES. The federal government has express constitutional power to enact bankruptcy laws; the states have also such power in less extensive sense so long as the federal government does not legislate upon the subject, but upon the enactment of the federal law, the state legislation for practically all purposes becomes suspended.

The federal constitution provides that "Congress shall have power" "to establish . . . uniform laws on the subject of bankruptcies throughout the United States."[4]

Is this power, thus expressly given, exclusive? It is well settled that if there is no federal law in force, each state may pass insolvency and bankruptcy laws. But upon the going into effect of a federal law, the state law is suspended, in so far as it covers the same ground. It is not abrogated or repealed by the federal act, but merely suspended to come again into force upon the repeal of federal law.[5]

The power of the state to enact bankruptcy laws is qualified in a twofold way. First: it cannot pass such a law to affect the credits of a citizen of any other state, unless such citizen voluntarily submits to jurisdiction;[6] and, second: it cannot enact a law whereby debts may be discharged which take their inception prior to the enactment.[7]

4. U. S. Const. Art. I, Sec. 8.

5. Sturges v. Crowinshield, 4 Wheat. (U. S.) 122; Ogden v. Saunders, 12 Wheat. (U. S.) 213; Harbaugh v. Costello, 184 Ill. 110; Stellwagen v. Clum, 245 U. S. 605.

6. Suydam v. Boyd, 14 Pet. (U. S.) 67; Ogden v. Saunders, *supra;* McMillan v. McNeal, 4 Wheat. (U. S.) 209.

7. Sturges v. Crowinshield, *supra.*

The second qualification follows from the provision of the constitution that no state shall pass any law impairing the obligation of contract.[8] Manifestly a law providing that a debt arising out of an already existing contract should be discharged without the consent of the creditor, would be an impairment of a contractual obligation.[9] But a contract entered into after the enactment of a state bankruptcy law, is made with the knowledge of the possibility of that law being appealed to, and may therefore very properly be said to be subject to that law.[10] But in the case of the federal government, the constitutional inhibition does not apply; it relates in terms to action by the state. The federal Act need not, and in fact does not save from its operation already existing indebtedness.

Sec. 4. THE EXTENT OF THE FEDERAL POWER; CONSTITUTIONALITY OF PRESENT ACT. The Congress is given power to pass uniform laws on the subject of bankruptcies. The only inhibition is that the laws must be uniform. This refers to territorial uniformity and does not forbid the recognition by general language of local laws to affect the application of the act. The present bankruptcy act is constitutional.

We have seen in the last section that the United States has jurisdiction, expressly conferred in the constitution to enact laws on the subject of bankruptcies, and that its action upon the subject causes the suspension of state acts covering the same ground. We have now to inquire as to the extent of that power conferred

8. U. S. Const. Sec. 10.
9. Sturges v. Crowinshield, *supra*.
10. Ogden v. Saunders, *supra*.

upon the Federal government—what limitations are placed upon the power? We find that, outside of the limitations that apply generally to all acts of Congress, there is but one limitation—the law must be uniform. But what is meant by uniformity? Does it mean that the act must affect each individual exactly in the same way irrespective of local laws? Is the federal government forbidden to recognize local laws as to validity of liens, rights of exemption, and so on? It is well settled that the uniformity meant is a uniformity in this sense—that Congress must pass a law which shall be general in its provisions to affect all parts of the country alike.[11] It cannot pass a bankruptcy law that shall apply to some states and not to others. It cannot pass one law for the east and another for the west. But it is not forbidden to say in general terms that state laws as to exemptions and other rights of debtors or creditors shall not be affected by the act.[12]

The present law after providing for priority among various classes of debtors, then adds that debtors who have priority by the laws of the state shall have priority under the act; that a debtor shall be allowed the exemptions allowed by the law of his state; that liens good by the law of a state not acquired by judicial proceedings within four months shall be good in bankruptcy; and so on. It is readily seen that under the bankruptcy law a debtor of one state may have larger rights than a debtor of another because of the greater liberality of exemption laws; that a creditor may have greater rights in one state than in another, because of the difference in lien and priority laws. But it would be highly unfortunate if Congress could not recognize

11. Hanover National Bank v. Moyses, 186 U. S. 181.
12. Idem.

local conditions. It has been held that a bankruptcy law does not lack uniformity on these grounds, and that the act of 1898, is constitutional.[13]

Sec. 5. HISTORY OF BANKRUPTCY LAWS IN THE UNITED STATES. The various states have enacted insolvency and bankruptcy laws in force when there has been no federal law in force. Congress has passed four bankruptcy laws; and the Act of 1898, with amendments, is in force today.

Not stopping to consider the history of the legislation of the various states upon the subject of bankruptcy, we may notice briefly the history of bankruptcy legislation of the Federal Congress.

(1) Act of 1800, repealed in 1803.

The first bankruptcy act passed by Congress was the act of 1800. It was repealed in 1803. It was limited to *traders*. It provided for involuntary, but not voluntary bankruptcies. It was an unpopular act, owing largely to the popular distrust of federal legislation.

13. Idem; Stellwegen v. Clum 245 U. S. 605. In the latter case the court said: "Notwithstanding this requirement as to uniformity, the Bankruptcy Acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, though in these particulars the operation of the Act is not alike in all the states."

(2) Act of 1841, repealed in 1843.

This act was confined to traders, bankers, factors, brokers, underwriters and marine insurers. It provided for voluntary as well as involuntary proceedings. It was a law drawn upon modern theories, but was repealed for political reasons.

(3) Act of 1867, repealed in 1878.

The third act of bankruptcy was much longer lived than its predecessors. It provided for voluntary and for involuntary proceedings. It had many defects in it which are attempted to be remedied under the present act.

(4) Act of 1898 (now in force).

Our present law is the act of 1898. It was amended in 1903, 1906 and 1910. It has been the most permanent and the most successful federal bankruptcy law. There is no present indication of its repeal or fundamental change. It is the law to which our attention is particularly devoted throughout this book. Its text is set out in Appendix A.

Sec. 6. FUNCTION OF BANKRUPTCY ACT TO BENEFIT CREDITORS. One purpose of the Bankruptcy Act is to give creditors an equal share in the assets of an insolvent debtor.

Under the Bankruptcy Act, as we shall see, creditors share equally in the assets of the estate. To be sure some creditors are preferred over others, but all creditors of the same class share equally. The filing of a petition in bankruptcy gives each creditor in the

same class the same share in an insolvent's estate. In one way, of course, the creditors are prejudiced, in this, that the debts of the bankrupt are discharged, and they cannot afterwards compel him to pay what his bankrupt estate has not yielded, even though he afterwards secures assets. But it is often better for creditors to take immediately what they can get than to await the rebuilding of their debtor's fortune, whose present assets may be perhaps seized by one single creditor who has been most diligent in his race toward the debtor's present assets. The bankruptcy law provides that one creditor cannot get a preference over the others, and that all the assets of the bankrupt will be divided equally among creditors of the same class. To accomplish this end the more surely, the present law provides that all payments made to creditors at any time within four months prior to the date of filing a petition in bankruptcy shall be set aside and shall be returned by the creditors provided the creditor knew or had reasonable cause to know that a preference was intended.[14]

It is of course true where a creditor at the time a debt is incurred takes security, as, a chattel mortgage, the creditor is protected against loss of his debt in so far as the security is ample to cover it. Thus B applies to C for a loan. To secure the loan C exacts from B a mortgage upon B's real estate. The next day after B secures the money, certain of his creditors file a petition in bankruptcy. Here C is absolutely protected to the extent of his security. He has practically purchased an estate in B's property by which he can secure the payment of his debt. But a mortgage given

14. See Sec. 54, *post*.

to secure an already existing debt is a preference that may be avoided.

It is also true that certain *liens* secured by a creditor will be upheld in bankruptcy, although as a rule all liens secured through legal proceedings within four months prior to the time of filing the petition are dissolved.

These ideas will be fully developed at appropriate points.

Because the bankruptcy law is designed for the benefit of creditors, the creditors may file the petition in bankruptcy. A petition filed by creditors puts one in what is known as *involuntary bankruptcy.*

Sec. 7. FUNCTION OF BANKRUPTCY ACT TO BENEFIT THE DEBTOR. Another great purpose of the Bankruptcy Act is to benefit the debtor himself.

The Bankruptcy Act gives a debtor a chance to get on his feet again. So long as he has not taken the benefit of the act, he is a prey to his creditors. Every new piece of property which he accumulates becomes at once the subject of seizure by his creditors. The Bankruptcy Act provides that his debts (with some exceptions) shall be discharged. He can then get a new start, knowing that he is safe from interference by his creditors.

Because the bankruptcy law is designed for the benefit of the debtor he himself may file a petition in Bankruptcy. A proceeding so instituted is known as a case of *voluntary bankruptcy.*

In Hardie v. Swofford Bros. Dry Goods Co.[15] the Court says:

"For these considerations, we are disposed to deny

15. (C. C. A. 5th Cir.) 165 Fed. 588.

that in the present bankruptcy law the discharge of the honest debtor is a mere incident . . .; and on the contrary to assert that the release of the honest, unfortunate and insolvent debtor from the burden of his debts and restore him to business activity in the interest of his family and the general public, is one of the main, if not the most important objects of the law."[16]

Sec. 8. BANKRUPTCY DISCHARGES OBLIGATIONS IN THE FORM OF MONEY DEBTS. A discharge in bankruptcy does not discharge one of all his obligations, but only those which may be classed as debts. Debts (with a few exceptions) are discharged whether mature or not, but one's executory contracts are not affected, unless the bankruptcy proceedings operate as a breach of contract.

It may be said, it is thought, with accuracy that bankruptcy proceedings discharge obligations which are in the nature of debts, claims or liabilities, only; but it has been a point considerably mooted whether bankruptcy in itself constitutes a breach of an executory contract.[17]

Sec. 9. BRIEF VIEW OF PROCEEDINGS IN BANKRUPTCY UNDER PRESENT LAW.

It will perhaps give us a better understanding of our subject, to take a "bird's eye" view of the proceedings

16. In Williams v. Fidelity Co., 236 U. S. 549, the Court says: "It is the purpose of the bankruptcy act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from obligations and responsibilities consequent upon business misfortune." See also Stellwegen v. Clum, *supra,* at page 616.

17. See Section 68, *post.*

in bankruptcy under our present law, the federal act of 1898, and amendments thereto.

(1) *Filing of the petition.* The petition in bankruptcy begins the proceedings. It may be filed by the bankrupt himself, in which case we refer to the proceedings as voluntary; or by the creditors of the bankrupt, in which case we refer to the proceedings as involuntary.

(2) *Appointment of a receiver.* A receiver is an officer provided for in the bankruptcy law to take temporary charge of the bankrupt's estate where its preservation requires some one to go into immediate possession pending the election of a trustee by the creditors. The receiver is appointed by the Court. We see, therefore, he is not a necessary officer and is not appointed unless the condition of the estate requires it. He may be appointed immediately upon the filing of a petition and before the adjudication.

(3) *Adjudication in bankruptcy.* The adjudication is the judgment of the Court that the party against whom or by whom the petition is filed is a bankrupt. In voluntary proceedings the adjudication proceeds as a matter of course in a few days. In involuntary proceedings, it follows by default unless the bankrupt resists it. He may defend that he ought not to be adjudicated a bankrupt and is entitled to a trial.

(4) *Filing of schedules.* The bankrupt upon his adjudication must file a list of his creditors and schedule his assets. In voluntary proceedings the schedules are filed with the petition.

(5) *First meeting of creditors.* The creditors hold a meeting at which they elect a trustee and examine the bankrupt.

(6) *Examination of bankrupt.* The bankrupt must submit to an examination in reference to his assets if the creditors demand it.

(7) *Election of trustee.* The trustee is the officer who takes title to the bankrupt's estate and who administers the estate. He succeeds the receiver. He is a necessary officer in cases where the bankrupt has assets above his exemptions. The trustee is elected by the creditors; he must file a bond.

(8) *Collection of assets.* After his election the trustee should proceed to get in all the assets of the estate, bringing suit where necessary.

(9) *Proof of debt.* The creditors must file proofs of their debts. These debts are allowed as a matter of course unless objections are made.

(10) *Declaration of dividends.* Dividends are declared and paid as we shall note hereafter.

(11) *Application for discharge.* The bankrupt must apply for his discharge within the time fixed by the act.

(12) *Objection to discharge.* Any creditor may file objections to the discharge of the bankrupt, setting up as a reason, that the bankrupt has offended against some provision of the bankruptcy law. In such a case, the objection is heard and passed upon. If sustained, the bankrupt is denied discharge in bankruptcy.

(13) *Discharge.* There being no objection or the objections being found baseless, the bankrupt is granted his discharge. This frees him from his dischargeable debts. Some sorts of debts are not dischargeable in bankruptcy.[18]

18. These items are developed at length in their appropriate places in the subsequent discussion.

CHAPTER 2.

THE COURTS AND OFFICERS IN BANKRUPTCY.

Sec. 10. THE COURTS THAT HAVE BANKRUPTCY JURISDICTION. Under the act of 1898, the Courts which have jurisdiction in bankruptcy causes, are the Federal District Courts for the states and territories "the Supreme Court of the District of Columbia and the United States Court of the Indian Territory and of Alaska." [19]

The courts vested with bankruptcy jurisdiction under the present bankruptcy act, are the United States District Courts, with the courts named for the jurisdictions which the District Courts do not serve, as indicated in the black letter text above; and all bankruptcy causes must be brought in the appropriate court.

Sec. 11. THE TERRITORIAL LIMITS OF THE COURTS JURISDICTION. The United States is divided into judicial districts, each district being either coterminous with a state or territory or a part thereof.

The courts of bankruptcy are (with the additional courts named) the federal district courts, and the federal district courts are the courts established to exercise jurisdiction over the judicial districts established by Congress. Each district constitutes a state or territory or a part thereof. In other words there is at least one judicial district, with a district court therein, for each state, and may be several. Thus, to illustrate, in

19. B. A. 1898, Sec. 1, Cl. 8; Id. Sec. 2.

Alabama there are three federal judicial districts, known as the northern, middle and southern districts of Alabama. In Maine, there is one judicial district, known as the District of Maine. In each of these judicial districts, having territorial jurisdiction over it, there is a court known as the United States District Court, and it is such court which is vested with jurisdiction over bankruptcy cases which arise within that district.

Sec. 12. JURISDICTION AS DETERMINED BY THE LOCATION OF THE BANKRUPTCY CAUSE WITHIN THE JURISDICTION. **Any court of bankruptcy, as distinguished from the courts of bankruptcies in other districts, has jurisdiction over any particular cause when the party concerned as a bankrupt has had a principal place of business, resided, or had a domicile within the territorial limit of the jurisdiction, for the greater part of six months just preceding or has property within that jurisdiction.**

We have seen that there are many courts of bankruptcy throughout the United States on account of the division into districts, each court of bankruptcy, as so defined, being of equal dignity with any other court, but having jurisdiction only within its own territorial limits. When may a bankruptcy cause properly be said to be within any particular territory, so that the court there may fasten its jurisdiction upon it? The law provides that this depends upon the facts of residence, or domicile, of having a principal place of business, or having property within the jurisdiction. The law reads:[20]

"[That the courts of bankruptcy as defined shall have such jurisdiction as will enable them to] adjudge per-

20. B. A. 1898, Sec. 2.

sons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdictions or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction."

It is desirable to discuss briefly the following items:

(1) The period of residence, having domicile or principal place of business.

This must be for the greater part of six months next preceding the adjudication. This means any time, at either the beginning or end of the six months, or interspersed throughout, constituting more than three months.[21]

(2) Residence of debtor.

If the debtor resides in the district for the greater part of the preceding six months the court in that district has jurisdiction. Residence is a fact consisting in living at a place. It has been defined as "personal presence in a fixed and permanent abode."[22]

But it is not so broad as domicile, for one may have a domicile where he does not presently reside.[23]

21. In re Plotka, (C. C. A. 7th Cir.) 104 Fed. 967; In re Tully, (D. C. N. Y.) 156 Fed. 634; In re Isaacson, (D. C. N. Y.) 161 Fed. 777.

22. In re Dingelhoef, (C. C. A. 5th Cir.) 109 Fed. 868.

23. In re Garneau, (C. C. A. 7th Cir.) 127 Fed. 677.

(3) Domicile of debtor.

The debtor may be made a bankrupt in the district in which for the greater portion of the last six months he has had his domicile. "Domicile is the place where one has his true, fixed permanent home and principal establishment, and to which when he is absent he has the intention of returning, and where he exercises his political rights."[24]

(4) Principal place of business of debtor.

The petition may be filed in the District in which the debtor has had his principal place of business for the greater part of the last six months. A principal place of business is a place in which the principal business affairs of a person have their head—the place where his central offices are located, or his business chiefly carried on.[25]

As applied to corporations, it has been held that it will be presumed that the principal place of business is the place stated in the charter.[26] But it may be elsewhere and is a question of fact.[27] Thus in one case it was held to be where the coal was mined and the productive operations carried on, although the office in which the books were kept and the sales made was in another jurisdiction.[28]

24. Idem; In re Davis, (D. C. N. J.) 217 Fed. 113.
25. In re Gurler & Co., (D. C. Ia.) 232 Fed. 1016.
26. In re Devonian Mineral Spring Co., (D. C. Ohio) 272 Fed. 527.
27. Dressler v. North State Lumber Co., (D. C. N. C.) 107 Fed. 253.
28. Continental Coal Corp. v. Roszelle Bros., (C. C. A. 6th Cir.) 242 Fed. 243.

(5) Concurrent jurisdiction of different courts where domicile, place of residence and principal place of business not in same district.

It follows from what has been said that a petition in bankruptcy might be filed in more than one district, as residence might be in one, domicile in another and place of business in a third. Any one of these districts would have jurisdiction.[29] The troublesome cases arise where a petition is filed in more than one jurisdiction where there are two or three possible jurisdictions. Will the several courts retain jurisdiction? The answer is that the court first obtaining jurisdiction will retain it and the entire administration removed to that court, the other courts yielding jurisdiction,[30] unless the greater convenience of the parties in interest demands retention of jurisdiction by the other court.[31]

"Parties in interest" includes not only general creditors, but prior and secured creditors, the bankrupt, and every other party whose pecuniary interest is affected by the proceedings.[32]

"Greater convenience" depends on all the circumstances—proximity of creditors, proximity of bankrupt and witnesses, location of assets, and any other factors appealing to the court as in the interest of an orderly, economical and efficient administration of the assets.[33]

(6) Where bankrupt, not qualifying otherwise, has property in the jurisdiction.

If the bankrupt does not have principal place of business, domicile or residence within the United States,

29. In re Gurler & Co., (D. C. Ia.) 232 Fed. 1016.
30. In re Stern & Levi, (D. C. Tex.) 190 Fed. 70.
31. Idem; Gen. Ord. in Bankr. No. 6.
32. In re Devonian Mineral Spring Co., (D. C. Ohio) 272 Fed. 527.
33. Idem.

but has property within the jurisdiction, the court in which such property is situated may entertain a bankruptcy petition.[34] This provision permits a proceeding against a non-resident debtor where he has property within a district of the United States. Manifestly personal supervision over him cannot be had or the claims of foreign creditors discharged if he is not found within the jurisdiction for service, but the property within the jurisdiction can be administered in bankruptcy.

Sec. 13. ANCILLARY JURISDICTION. Under the express authority of the bankruptcy act, ancillary jurisdiction may be exercised in any district other than the one in which the main proceedings are being had in aid of a receiver or trustee appointed in any bankruptcy proceedings.

A court of any district having jurisdiction and a receiver or trustee being appointed, it may be very important that some action be taken in another district for the preservation of assets in that other district. Accordingly ancillary proceedings are authorized by the bankruptcy act.

Sec. 14. EXTENT OF JURISDICTION OVER SUBJECT MATTER. The court of bankruptcy has power to enter any order or entertain any proceeding necessary to carry into execution the provisions and meaning of the bankruptcy act.

The bankruptcy act of 1898 sets out in section 2 thereof an enumeration in detail of the powers of the bankruptcy court, adding that "Nothing in this section contained shall be construed to deprive a court of bank-

34. Bankr. Act, Sec. 2 (1).

ruptcy of any power it would possess were certain specific powers not herein enumerated." [35] By the particular enumeration of powers, the extent of the courts jurisdiction is made clear, and the enumeration is to be taken as a broadening of its general power rather than a narrowing thereof.

Sec. 15. JURISDICTION OF BANKRUPTCY COURT TO RECOVER ASSETS. The bankruptcy court has jurisdiction to recover assets of the estate, held by or in the possession of third persons. If they are not adversely held, the court may recover them in summary proceedings, but if adversely held there must be a suit to recover them.

The bankruptcy law gives the court of bankruptcy jurisdiction to recover assets belonging to the bankrupt estate. The trustee may also sue in other courts, as we shall discover, to recover assets adversely held, and therefore the jurisdiction is concurrent to this extent. Under the act as originally enacted, there was no power to entertain a suit by the trustee for the recovery of property without the consent of the defendant to the jurisdiction.[36] This was subsequently remedied by amendment, and now the act provides that a trustee in bankruptcy may sue in the District Court to set aside a preference to a creditor,[37] to enforce liens which should be preserved for the benefit of the estate;[38] and to avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, or recover the value thereof. Otherwise, "Suits by the trustee shall only be brought or prosecuted in the courts where the

35. Sec. 2 (20).
36. Bardes v. Bank, 178 U. S. 524.
37. B. A. 1898, Sec. 60b (as amended 1903 and 1910), Collett v. Adams, 249 U. S. 545.
38. *Ibid.,* Sec. 67c.

bankrupt whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."[39]

Sec. 16. JURISDICTION OF STATE COURTS. A trustee in bankruptcy may bring a plenary proceeding in a state court to recover property adversely held whenever the bankrupt, had not such proceedings intervened, would have had a right to sue in such courts, and may bring any suit in a state court which he could bring in the District Court of the United States.

The trustee may sue to recover assets in any state court in practically every case where he might sue in a District Court, and may also sue in such state court whenever the bankrupt, had bankruptcy proceedings not intervened, might have sued in such state court.[40]

Sec. 17. SUMMARY PROCEEDINGS IN DISTRICT COURT TO RECOVER PROPERTY. The District Court of the United States may entertain proceedings of a summary character to recover assets which are not adversely held. Property is adversely held whenever the possession thereof has been acquired prior to the institution of proceedings in bankruptcy.

If property is adversely held, there must be a plenary suit, either in the District Court or elsewhere, to recover it. But if not adversely held, then summary proceedings may be entertained by the District Court. In other words if property alleged to belong to the bankrupt

39. *Ibid.*, Sec. 23b.
40. *Ibid.*, Sec. 70e; Stellwegen v. Clum, 245 U. S. 605 at 614.

estate, is in the adverse possession of another, the trustee must start the usual suit at law to obtain possession of it, with the regular pleadings, the summons, the time to answer, and the trial. But if not adversely held, the court may order its possession taken by marshal, receiver or trustee and the right to it summarily disposed of in a hearing before it brought up on motion.[41]

It therefore becomes important to determine when property is adversely held and when not adversely held. And in answer to that it may be said generally that property is adversely held, whenever the claimant has possession prior to the institution of the proceedings in bankruptcy. But if possession is afterwards obtained, then the property is not adversely held.[42]

Sec. 18. APPELLATE JURISDICTION. The Bankruptcy Act provides for review of proceedings by the Circuit Court of Appeals and the Supreme Court. This review may be by appeal in certain cases, by petition to revise matters of law in certain cases and upon a certificate from a Supreme Court Justice where he believes that a determination of the question is essential to uniform construction.

Chapter 4 of the Bankruptcy Act, contains provisions as to the jurisdiction of the Appellate Courts. A reference to that chapter and particularly to sections 24 and 25 will disclose the nature of the appellate jurisdiction. It will be seen that the methods of taking a case up for review are of three sorts (1) By appeal; (2) By petition for revision and (3) By certificate of importance. In the

41. In re Rathman, (C. C. A. 8th Cir.) 183 Fed. 913; Babbitt v. Ducher, 216 U. S. 102; Stone-Ordean-Wells Co. v. Mark, (C. C. A. 8th Cir.) 227 Fed. 975.

42. In re Rathman, *supra;* Stone-Ordean-Wells Co, *supra;* Weidhorn v. Levy, 253 U. S. 268.

petition to revise, which goes to the Circuit Court of Appeals, there is only the right to review questions of law. Any question as to fact must be taken up by appeal.[43]

Sec. 19. THE REFEREE IN BANKRUPTCY. The referee in bankruptcy has a jurisdiction somewhat analogous to that of a master in chancery. His powers are quite broad, but are subject to revision by the judge. The act details his powers.

The referee in bankruptcy is an officer to whom the cases are referred. Such referee has immediate charge of all the details of administration. His powers are, however, at all times subject to review by the judge, to whom his rulings may be certified when the party adversely affected is not contented to abide by the referee's decision. The referee has power to adjudicate debtors bankrupt, dismiss petitions, examine witnesses, declare dividends, examine schedules and order amendments thereof, give notices to creditors, and generally to attend to the detail of administration.[44]

A referee has no jurisdiction until there has been a reference to him.[45]

He is appointed by the judge for a period of two years.

43. Hall v. Reynolds, (C. C. A. 8th Cir.) 224 Fed. 103.
44. B. A. 1898, Secs. 34, 35.
45. Weidhorn v. Levy, 253 U. S. 268. (He has no power except by order of reference and his judicial functions are subject to review by the court.)

CHAPTER 3.

WHO MAY BE A BANKRUPT.

Sec. 20. INTRODUCTORY.

Bankruptcy laws originally applied only to traders. One who was not a trader could not become or be made a bankrupt. The law of 1800 applied to merchants actually using the trade of merchandizing, or engaged as a banker, broker, factor, underwriter or marine insurer. The present law, however, is a very wide one and has an extensive application. We shall consider the subject under these general headings: (A) In respect to the business or calling of the debtor, (B) In respect to the legal status of the debtor, (C) in respect to the amount which the debtor owes.

The bankrupt must come within the provisions of the law. Consent by one not subject to the law cannot confer jurisdiction.[46]

A. In Respect to Business or Calling.

(*a*) *Of natural persons.*

Sec. 21. IN GENERAL. Any natural person may file a voluntary petition; and any natural person, except a wage earner, a farmer or tiller of the soil, may be made an involuntary bankrupt.

We find that the law provides that any natural person (as distinguished from corporations) may file a petition

46. Vallely v. Northern Fire & Marine Ins. Co., 254 U. S. 348.

in bankruptcy. We shall hereafter see that this may not include infants or insane persons, but every sane, adult citizen, no matter what his occupation or business, may become a voluntary bankrupt.[47] We find, however, that when we come to involuntary bankruptcy there are some exceptions, to-wit: wage earners and farmers or tillers of the soil. These we will now consider.

To be made an involuntary bankrupt, one must owe $1000 or over, but we shall take further note of this in a later section.

Sec. 22. WAGE EARNERS. A wage earner, earning $1500 a year or less cannot be adjudged an involuntary bankrupt, but he may become a voluntary bankrupt.

A "wage earner" under the bankruptcy law is one who "works for wages, salary or hire, at a compensation not exceeding one thousand, five hundred dollars per year."[48] Such a person may become a voluntary bankrupt, but involuntary proceedings cannot be maintained by his creditors.[49]

A wage earner is one who works for another for wages, salary or hire, as, a bookkeeper, a teamster, a school teacher. But one who is in business himself is not working for wages, salary or hire within this exception. Thus a lawyer earning less than $1500 a year in fees would not be exempt, but if he were working for another lawyer at a salary of $1500 a year, he would be within the exception. So it has been held that a music teacher giving lessons to various students at so much per hour or lesson is subject to involuntary proceedings, but such if teacher were employed at some

47. B. A. 1898, Sec. 4.
48. Id., Sec. 1, par. 27.
49. Id., Sec. 4b.

home or school, he could not be proceeded against, unless making more than $1500 per year.[50]

Sec. 23. PERSONS ENGAGED CHIEFLY IN FARMING OR TILLING THE SOIL. A person whose chief occupation is farming or tilling the soil cannot be made an involuntary bankrupt, no matter what his income is, but he may become a voluntary bankrupt.

(1) Purpose of this exception.

"The intent of congress to protect men engaged in agriculture who might fall behind from the failure of crops for one or two seasons, has always been recognized as the basis for this provision in the statute."[51]

Farmers may file voluntary petitions, but are not subject to involuntary proceedings by creditors.

(2) Who is person "engaged chiefly in farming or tillage of the soil."

A farmer is one who makes farming his chief livelihood. He may be a farmer within the meaning of the bankruptcy law, although he have other businesses or sources of revenue. The test is whether farming is of chief concern to him as an occupation of some permanence to which he looks for his chief source of revenue.

For example, B had two farms aggregating 240 acres which he managed himself, employing one assistant besides his son, and raising crops of wheat, oats, corn, hay, besides owning cows and selling milk. He also had a small store from which his income was $50 or $60 a year; and he sold $200 worth of fertilizers as agent for

50. First National Bank v. Barnum, (D. C. Pa.) 160 Fed. 245.
51. In re Doroski, (D. C. N. Y.) 271 Fed. 8.

a phosphate concern. Held, he was a farmer and not subject to involuntary bankruptcy proceedings.[52]

M had a farm of 122 acres, which he tilled, but also conducted a store in which he sold meats and produce. During the year he sold about $6,000 worth of meat of which about $850 was produced from his farm, the rest being purchased of others or sold on commission for others. Held, not a farmer within the meaning of the act.[53]

A person who buys and sells cattle as his main business is not a farmer although he owns a farm which he makes use of in the business.

Thus, B resided on a farm of 300 acres which he had purchased but upon which he had paid but little. He farmed 100 acres, but his chief activity was to buy cattle which he kept on the farm until he resold them at auction. In this business he became largely indebted. Held, not a farmer.[54]

But "stock farming" is as much farming as "grain farming." The distinction between stock dealing and stock farming seems to be whether he buys and sells stock as a drover or stock dealer, or as a stock farmer using his farm incidentally in the former case, but as a real farm for cattle or hog raising in the latter.[55]

Carrying on any business incidental to farming does not prevent one from being a farmer and so not subject to be made a bankrupt in involuntary proceedings.

W had a farm of 700 acres, which was devoted to cultivation and grazing. He kept about 100 cows

52. Rice v. Bordner, (D. C. Pa.) 140 Fed. 566.

53. In re Mackey, (D. C. Del.) 110 Fed. 354.

54. In re Brown, (D. C. Ia.) 132 Fed. 706; see also similar case, Bank of Dearborn v. Mackey, (D. C. Mo.) 132 Fed. 75.

55. In re Dwyer, (C. C. A. 7th Cir.) 184 Fed. 880; In re Sutter, (D. C. Mo.) 270 Fed. 248.

which he fed principally from his farm products. He sold milk from these cows at retail by means of wagon deliveries, employing men to retail it. Held, to be a farmer and not subject to involuntary bankruptcy.[56]

A farmer may be a *voluntary* bankrupt.

Sec. 24. OCCUPATION CONSIDERED AS OF WHAT DATE. The occupation at the time the alleged act of bankruptcy is committed governs whether he may be proceeded against in bankruptcy.

Whether one is in an occupation exempting him from involuntary bankruptcy depends upon what he was doing at the time of the act of bankruptcy complained of.

A merchant becomes insolvent and commits an act of bankruptcy. Thereafter and before his creditors act he changes his occupation and becomes a clerk on a salary of $1500 a year. The petition being filed in apt time, the bankrupt cannot plead he was not amenable to the act being a wage earner.[57]

(*b*) *Corporations.*

Sec. 25. IN GENERAL. Any corporation except a municipal, railroad, insurance or banking corporation, may become a voluntary bankrupt, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance or banking corporation is subject to involuntary bankruptcy.

(1) History of this section.

The Act of 1898, as originally drawn, did not permit corporations to file voluntary petitions, and limited in-

56. Gregg v. Mitchell, (C. C. A. 6th Cir.) 166 Fed. 735.

57. In re Crenshaw, (D. C. Ala.) 156 Fed. 638. In re Doroski, (D. C. N. Y.) 271 Fed. 8.

voluntary petitions to corporations engaged principally in "manufacturing, trading, printing, publishing, or mercantile pursuits." By the amendment of 1903, mining corporations were added. This resulted in the necessity of determining in many cases whether a corporation was within the Act; and there were a great many corporations excluded as non-trading, or non-manufacturing, as hotel corporations, bond corporations, advertising corporations, etc. By the amendment of 1910, *all* corporations were made subject, *except* certain ones enumerated. This is the logical and less troublesome method.[58]

(2) Corporations which can file voluntary petitions.

Unless a corporation is a municipal, railroad, insurance or banking corporation, it may, whether it be commercial or non-commercial, for profit, or not for profit, file a petition in bankruptcy.

For example, an incorporated Odd Fellows Lodge, which is purely fraternal, can file a petition in voluntary bankruptcy.[59] Such a corporation could not be forced into bankruptcy.

(3) Corporations which are subject to involuntary bankruptcy.

To be subject to *involuntary* bankruptcy a corporation

(a) Must be moneyed, business or commercial,

(b) Must not be a municipal, railroad, insurance or banking corporation.

58. The earlier decisions on these distinctions, construing the earlier law are of course obsolete.

59. Matter of Carthage Lodge, I. O. O. F., 36 A. B. R. 873.

(4) What are moneyed, business or commercial corporations.

To be an involuntary bankrupt a corporation must be "moneyed, business or commercial." This clause is very broad and includes practically all incorporations for profit except the corporations expressly excepted (municipal, railroad, insurance, banking).

(5) Public service corporations.

A public service corporation is a private corporation carrying on a business which is touched with a public use, as telegraph and telephone companies, electric light companies, street railway companies and the like. Are these subject to bankruptcy proceedings? Clearly no distinction can be taken under the language of the law as to whether the proceedings are voluntary or involuntary as far as this question is concerned and we may simply inquire whether they are subject to bankruptcy jurisdiction be the proceedings voluntary or involuntary. *Railroad corporations* are public service corporations which are exempt by express exception. But unless it be by implication other public service corporations are not excluded.

And it has been held that they are not excluded. In the cases of in re Grafton Gas Electric Light Company; in re Grafton Traction Company; and in re Grafton Light & Power Company; in consolidated proceedings [60] it was held that such corporations were within the act (the proceedings were voluntary) as not having been excepted therefrom.

The most serious question was in reference to the street electric railway line which might be construed to

60. (D. C. W. Va.) 253 Fed. 668.

be a "railroad company," but the court thought that the congressional intention was to include all corporations except those specifically excluded, and thought that the reasons for excluding railroads did not exist in case of local street railways.

(6) Municipal corporations.

That a municipal corporation (a city or town) should be excluded from the act is apparent. Such municipalities must work out their financial problems.

(7) Railroad corporations.

Railroad corporations are not subject to bankruptcy proceedings either voluntary or involuntary. Such corporations may operate after insolvency under receiverships, and clearly present many problems that are peculiarly their own.

(8) Insurance corporations.

The problems of insurance corporations are peculiar. They are organized under laws that create state supervision, require deposits of money with the state, and other regulations. In case of insolvency, their liquidation requires another solution than that furnished by a court of bankruptcy. They can neither be voluntary or involuntary bankrupts.[61]

(9) Banking corporations.

A banking corporation, whether state or federal, if incorporated, is not subject to either voluntary or involuntary proceedings. The exclusion is made because

61. Vallely v. Northern Fire Ins. Co., 254 U. S. 348.

state laws provide for the administration of and winding up of state banks, and the federal law provides for the administration and winding up of federal banks.

Unincorporated banks are subject to bankruptcy proceedings.

B. In Respect of Legal Status.

Sec. 26. CORPORATIONS. Corporations, except as noted, may become voluntary or be made involuntary bankrupts.

In considering the application of the bankruptcy act to persons or corporations from the standpoint of nature of occupation or business, we have incidentally found that a corporation is subject to the bankruptcy act as has been noted.

Sec. 27. UNINCORPORATED COMPANIES (WHICH ARE NOT PARTNERSHIPS). An unincorporated company may be adjudicated a bankrupt.

The act provides that "any unincorporated company" (owing the requisite amount) "may be adjudged an involuntary bankrupt." This designation is used to apply to concerns which are not incorporated and which are not partnerships.

For example. The Order of Sparta was an unincorporated concern whose object was to establish a fund for payment of death claims. Held, "an unincorporated company" within the meaning of the law and subject to involuntary bankruptcy.[62]

62. Order of Sparta, (C. C. A. 3rd Cir.) 39 A. B. R. 523.

Sec. 28. PARTNERS AND PARTNERSHIPS. Partnerships and the partners therein, are subject to voluntary and involuntary bankruptcy.

The Bankruptcy Act gives considerable attention to the subject of partnerships.[63]

(1) Provisions of act.

"A partnership during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." "In the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by the consent of the partner or partners not adjudged bankrupt, but such partner or partners not adjudged bankrupt, shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the partner or partners adjudged bankrupt."[64]

(2) The partnership as an entity under the act.

A partnership is not an entity, but an association of individuals. The partners are individually jointly liable for partnership debts. Claims of the partnership are the claims of the partners. They are the creditors and debtors of those with whom they deal, and there is not separate entity existing legally apart from them in the sense that a corporation exists apart from its shareholders.

63. Bankr. Act 1898, Sec. 5; General Orders in Bankr. No. VIII.

64. See also other provisions of Sec. 5, Appendix A, *post.*

The language of the partnership act in allowing a petition to be filed by or against a partnership seems to make it in partnership practice an entity.[65] But that this is its legal effect is doubtful. A recent United States Court decision has said: "Ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available to that end. A judgment could be got and the partnership debt satisfied on execution out of the individual assets. . . If as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, is to administer both in bankruptcy."[66]

In an Illinois case, lately decided, the court said: "It necessarily follows that in an involuntary proceeding, where the act of bankruptcy charged is one involving insolvency of the partnership, there can be no adjudication against the partnership, unless it and all its members are insolvent, and upon an adjudication of insolvency, the assets of all the partners are turned into the proceeding for administration."[67]

These cases point in the right direction. It would be unfortunate to have a different view of a partnership prevail under the bankruptcy act than prevails under the general commercial law.

Sec. 29. MINORS. A minor cannot be adjudged a bankrupt except as to debts which he cannot avoid.

A minor's debts are voidable by him. Hence, bankruptcy proceedings would seem futile.[68]

65. In re Hansley & Adams, (D. C. Cal.) 225 Fed. 311.
66. Francis v. McNeal, 228 U. S. 695.
67. Abbott v. Anderson, 265 Ill. 285.
68. In re Duiguid, (D. C. N. C.) 100 Fed. 274; In re Dunnigan Bros., (D. C. Mass.) 95 Fed. 428.

But some obligations are binding upon a minor. Thus his liability to pay for necessaries supplied him and in some states his liability if in business for himself is not avoidable. Hence bankruptcy proceedings in such case seem logical. So it has been held that a judgment for a tort against a minor is a liability dischargeable in bankruptcy.[69]

Sec. 30. INSANE PERSONS. An insane person cannot be made a bankrupt. If he becomes insane after adjudication and while the proceedings are pending this will not abate the proceedings.

An insane person cannot commit an act of bankruptcy or be made a bankrupt in an involuntary proceeding and certainly he is not a proper person to file a petition. If after the petition is filed and the adjudication entered he becomes insane, the proceedings will not abate.[70]

Sec. 31. ESTATES OF DECEASED PERSONS. The estate of a deceased person, though insolvent, cannot be taken into a Court of Bankruptcy. It is to be administered in the usual way in the Court of Probate.

An insolvent estate of a decedent is to be administered and wound up as other estates, that is, in a Court of Probate. But where a person is adjudicated a bankrupt and dies while the proceedings are still pending, the estate will continue to be administered by the bankruptcy court.

Sec. 32. ALIENS. An alien who resides or is domiciled or has a place of business, or property in the United States,

69. In re Walrath, (D. C. N. Y.) 24 A. B. R. 541.
70. In re Kehler (D. C. N. Y.) 153 Fed. 235.

may file a petition in bankruptcy or have a petition filed against him.

An alien may be a bankrupt under our law provided he lives, has a place of business, or owns property here.[71]

C. In Respect to Amount of Indebtedness.

Sec. 33. VOLUNTARY BANKRUPTCY. One who owes debts of any amount whatever may be a voluntary bankrupt.

There is no limitation in the law as to amount of indebtedness which a voluntary bankrupt must owe.[72]

Sec. 34. INVOLUNTARY BANKRUPTCY. Involuntary bankruptcy proceedings require that the bankrupt owe $1000 or over.

A debtor cannot be made a bankrupt unless his indebtedness is $1000 or over. The petitioning creditors must have claims aggregating $500 and this sometimes confuses one into the belief that that is the amount which the bankrupt must owe. But he must owe $1000.[73]

71. In re Berthoud, (D. C. N. Y.) 231 Fed. 529.
72. Bankr. Act, 1898, Sec. 4a.
73. Id., Sec. 4b.

CHAPTER 4.

ACTS OF BANKRUPTCY.

A. Introductory.

Sec. 35. IN GENERAL. In an involuntary petition it is necessary for the creditors to allege some act of bankruptcy. What shall constitute an act of bankruptcy is set out specifically by the law.

Our National Bankruptcy Law provides that a debtor may be made an involuntary bankrupt when an act of bankruptcy has been committed by him. It is not enough that a debtor be unable to pay his debts. An act of bankruptcy may be considered as the indication to the world that the bankrupt is a fit subject for the bankruptcy courts.

The acts of bankruptcy are here enumerated. The law provides:[74] "Acts of bankruptcy by a person shall consist of his having

(1) Conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or

(2) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final

74. Id., Sec. 3.

disposition of any property affected by such preference, vacated or discharged such preference; or

(4) Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, or of the United States; or

(5) Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

We will consider these "acts of bankruptcy" *seriatim.*

Usually an act of bankruptcy involves a transaction which may be set aside, but whether it may be avoided is an entirely different question from whether it is an act of bankruptcy.

Sec. 36. INSOLVENCY DEFINED; WHEN AN ESSENTIAL ELEMENT IN BANKRUPTCY. Insolvency is defined by the Bankruptcy Law, in the quotation, below. It usually exists whenever any act of bankruptcy is committed and is an essential element in most acts of bankruptcy.

(1) Definition and importance of insolvency.

We have heretofore noticed the difference between insolvency and bankruptcy—that the former term denotes a financial condition, through which by the indulgence of creditors one can often come successfully without having his business life, his property or his debts in any way affected, while the latter signifies judicial proceedings for the purpose of dividing among his creditors the property of one, insolvent, whose debts thereupon become discharged. Bankruptcy is, in fact, the relief offered to the creditors of an insolvent debtor and to the debtor himself.

It is sufficient to notice here in reference to insolvency as an element of bankruptcy that it is usually essential. Why it might be held unessential is considered hereafter when we consider the act of bankruptcy in detail.

Insolvency is defined by the bankruptcy law to be as follows:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."[75]

Under our former bankruptcy law in force 1867-1879, one was insolvent when he stopped payments in the ordinary course of trade. In fact, this has been the test of all bankruptcy laws until the present.

(2) How valuation arrived at to determine insolvency.

To determine whether a person is insolvent, we inquire whether all his property, including his exemptions, exclusive of property fraudulently conveyed by him, when taken at a fair valuation, before bankruptcy proceedings were begun, is not of sufficient value to pay his debts.

Exemptions of bankrupt. We have noticed, and will note more particularly hereafter that a bankrupt is entitled to the exemptions that are allowed to him by the local law of his state. In determining whether a person is insolvent these exemptions must be included as a part of his assets, even though the result is not enough unexempt property to satisfy the liabilities.

75. Bankr. Act 1898, Sec. 1, par. 15.

Property fraudulently conveyed. In the determination of solvency, property that the bankrupt may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, is to be excluded. The bankruptcy act so provides, and the reason is apparent. By that means a debtor has accomplished his own insolvency so far as his visible assets are concerned, unless the creditors can set aside the transfers or uncover the concealments. It may be a question whether the transfers are fraudulent, or whether the concealments have been made, and if they have, whether they can be set aside or recovered. The debtor has temporarily, at least, removed these assets out of the way of his creditors, and hence they ought not be considered even though their recovery may mean more than enough to pay the debts in full.

Assets to be appraised at their fair value. The definition of insolvency requires that the assets are to be taken at a "fair valuation." It has been held that "fair valuation" means a value that can be made promptly effective by the owner of the property to pay debts. "Such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property."[76]

This "fair valuation" requires the business to be taken as a "going concern" when the act of bankruptcy was committed. "The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as a going concern, when the alleged preference

76. Stern v. Paper, (D. C. N. D.) 183 Fed. 228; In re Sedalia Farmer's Co-Op. Packing & Produce., (D. C. Mo.) 268 Fed. 898.

was given, and not to the mere dead matter of the plant after bankruptcy intervened."[77]

But this assumes that the business was in fact a going concern.[78]

(3) Defense that debtor is not insolvent.

If a debtor would defend against bankruptcy proceedings on the ground he is not an insolvent he must definitely and affirmatively put in the defense; if he does not deny it in the manner set out by the law he will be taken to have admitted it. If he does deny he may demand a jury to try the issues.

Sec. 37. WITHIN WHAT TIME ACT OF BANKRUPTCY MUST BE COMMITTED. A petition in involuntary bankruptcy must allege an act of bankruptcy committed within four months of the filing of the petition.

An act of bankruptcy may be considered as an outward expression of one's financial condition entitling creditors to proceed in bankruptcy. The bankruptcy proceeding is to afford relief from a presently existing financial embarrassment. Obviously the law must set a limit within which the act of bankruptcy must be done and the petition in bankruptcy filed in order to join them in an existing state of affairs. This limit has been determined by providing that the act of bankruptcy will subject the debtor to bankruptcy proceedings only if the petition is filed within four months thereafter.

The petition must allege an act of bankruptcy and

77. Butler Paper Co. v. Goembel, (C. C. A. 7th Cir.) 143 Fed. 295.

78. In re Jones, (C. C. A. 7th Cir.) 268 Fed. 818.

is defective unless it does so. It may be amended, but the amended petition must show an act of bankruptcy within four months of the filing of the amendment.[79]

B. The Particular Acts of Bankruptcy.

Sec. 38. FRAUDULENT TRANSFERS. A removal, concealment or transfer of a debtor's property with intent to defraud creditors if made within four months prior to the filing of the petition is an act of bankruptcy.

(1) In general.

A removal, concealment or transfer made or permitted by a debtor with intent to defraud his creditors is an act of bankruptcy under the present act.

A fraudulent transfer in the law of bankruptcy has two aspects of importance. It is an act of bankruptcy and it is a transaction to be set aside by the trustee in his recovery of assets whenever the transferee is actually or constructively, a party to the fraud. As an act of bankruptcy, it must occur within the four months period immediately prior to the filing of the petition. As a transaction to be set aside the only limitation is that which would be imposed were creditors seeking to set it aside had not bankruptcy intervened. In this section we consider the fraudulent transfer as an act of bankruptcy, but we will also necessarily say much that will be important under the other heading and therefore at that time our task will be much simplified by a mere reference back to this section.

(2) Fraudulent removals, concealments and transfers defined.

A fraudulent disposition or transfer of property is a transfer made with the intent to hinder, delay or de-

79. In re Triangle S. S. Co., (D. C. S. D.) 267 Fed. 303.

fraud creditors. The Bankruptcy law creates no new offense against creditors, but adopts one which has long been the law and makes it an act of bankruptcy. The court has said: "The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words.[80] And so constructed, the test of conveyances intended by subsection 1 of section 3 is that of the bona fides of the transfers."[81]

Fraudulent transfers have been divided into those that are for value or apparent value and those that are gratuitous. A voluntary transfer of property is looked upon as a fraudulent conveyance when made by creditor while insolvent upon the theory that a person "must be just before he is generous."

(3) Insolvency as an element in this act of bankruptcy.

Insolvency is not an element in this act of bankruptcy. One court has said:[82]

"Some acts of bankruptcy must be committed while the person is insolvent. The first act of bankruptcy defined may be committed by the person charged when perfectly solvent. If a solvent person conveys or transfers, conceals or removes, or permits to be concealed or removed any part of his property with the intent to hinder, delay or defraud his creditors, or any of them he commits an act of bankruptcy; and if within the ensuing four months, he becomes insolvent and a peti-

80. Githens v. Shiffer, (D. C. Pa.) 112 Fed. 505.

81. Lansing Boiler & E. Works v. Jos. T. Ryerson & Son, 128 Fed. 701.

82. In re Larkin (D. C. N. Y.) 168 Fed. 100.

tion is therefor filed against him such petition may allege such acts as the act of bankruptcy, and the person may be adjudged a bankrupt accordingly."

Solvency at the time the petition is filed is a defense when this is the act of bankruptcy alleged. The act provides "a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." If a person has made such fraudulent transfers but still is perfectly solvent when the petition is filed, there is no ground for putting him into bankruptcy as his estate will pay one hundred cents on the dollar. But in considering whether a debtor is insolvent property fraudulently conveyed or concealed is to be ignored, as we have seen in the last section defining insolvency.[83] If, therefore, such property were still concealed or conveyed, one's solvency would have to be determined by leaving it entirely out of consideration. If the trustee in bankruptcy could thereafter recover such property again, the estate might pay debts in full.

Sec. 39. PREFERENTIAL PAYMENTS OR TRANSFERS. Where within four months before the petition is filed, the debtor, being insolvent, intentionally prefers one or more creditors over the others this is an act of bankruptcy.

(1) Preference of creditor is act of bankruptcy.

One of the main purposes of the Bankruptcy Law being to secure an equal distribution of an insolvent's estate among his creditors, a transfer or payment by him while insolvent to any creditor, is logically considered an act of bankruptcy, justifying the other

83. In re Hines, (D. C. Ore.) 144 Fed. 142.

creditors by acting diligently (i. e. within four months) to put the estate in bankruptcy.

(2) Preference as act of bankruptcy as distinguished from preference which trustee may have set aside.

The preference, as an act of bankruptcy, consists in having "transferred while insolvent, any portion of his property, to one or more of his creditors, with intent to prefer such creditors over his other creditors."[84] The law also provides, as we shall consider at length hereafter, that a preference made to a debtor, within four months immediately prior to the filing of the petition shall be avoidable by the trustee, if the debtor "shall then have reasonable cause to believe" that the enforcement of the transfer would effect a preference.[85] The effect of preference to constitute an act of bankruptcy which looks to the bankrupt's intent, and its effect to constitute an avoidable transfer which looks to the creditor's intent must be kept in mind. A preference might be an act of bankruptcy when it could not be avoided by the trustee, and a preference that could be avoided might not constitute the act of bankruptcy upon which the proceedings are founded.[86]

(3) Intention to create preference requisite.

Under the language of the law, a preference is not an act of bankruptcy unless the bankrupt have an *intent* to prefer.[87] It is true, however, that every person must be intended to presume the necessary consequences of

84. Bankr. Act 1898, Sec. 3.
85. Id., Sec. 60b.
86. In re Smith, (D. C. N. Y.) 176 Fed. 426; Pirie v. C. T. & T. Co. 182 U. S. 438, 455.
87. Goodlander-Robertson Lumber Co. v. Atwood, (C. C. A. 4th Cir.) 152 Fed. 978.

his act. If he is insolvent and knows that he is insolvent and pays a creditor the full amount of his debt, or any amount which gives that creditor in fact a substantial preference, he must be taken to have intended a preference. And yet there may be preferences without intention to create them.[88]

(4) Preference may be by transfer of property or payment of money.

It is not merely the payment of a debt in cash, but any transfer in property by which a creditor obtains a greater percentage than others would get were the bankrupt's then assets divided among them, constitutes a preference.

(5) Creditor must get greater percentage.

To constitute a preference the payment made must be one that so reduces the estate that the other creditors would not get so great a percentage as the preferred creditor were the debtor's then assets divided among them.

(6) No preference unless prior debt.

To constitute a preference of a creditor there must be a payment of a *debt*. "When one gives an insolvent present value for a transfer of property or when he makes an exchange of property there is no preference."[89] In such a case there is a transfer of values. And it is immaterial in such a case that the property transferred

88. Goodlander-Robertson Lumber Co. v. Atwood, (C. C. A. 4th Cir.) 152 Fed. 978; In re Hallin, (D. C. Mich.) 199 Fed. 806; In re Columbia Real Estate Co., (D. C. N. Y.) 205 Fed. 980.

89. Ernst v. Mechanic's Bank, (C. C. A. 2nd Cir.) 201 Fed. 664.

does not bring full value. An insolvent person who is not yet bankrupt is not precluded from making transfer, buying and selling, borrowing money and giving valid, unimpeachable security therefor.

A preference means a *diminution in value* of the estate by a payment of a pre-existing debt. See further of this in discussion whether preferences can be set aside, section 54 post.

(7) Insolvency as an element in this act of bankruptcy.

A debtor cannot commit this act of bankruptcy unless he is insolvent.

Sec. 40. PREFERENCES SECURED THROUGH LEGAL PROCEEDINGS AS ACTS OF BANKRUPTCY. **This act of bankruptcy consists in a person having "suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."**

This act consists in a failure to prevent a preference by one creditor over the others through legal proceedings. It differs from the other acts in that it consists in no affirmative act on the part of the bankrupt. The terms "suffered and permitted" as here used indicate not a mere permission of an act that could be avoided, but a failure to prevent an act that could not be avoided, that is, a failure to prevent a preference through legal proceedings, although he have no way to prevent such preference.[90]

Sec. 41. GENERAL ASSIGNMENTS FOR BENEFIT OF CREDITORS AND RECEIVERSHIPS AS ACTS OF

90. Wilson Bros. v. Nelson, 183 U. S. 191.

BANKRUPTCY. This act of bankruptcy consists in having "made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, or of the United States."

(1) General assignment for benefit of creditors.

If a debtor assigns his property to a trustee or assignee in order that such assignee or trustee may hold it for the benefit of his creditors, this is both an act of bankruptcy and a transaction that will be set aside by the court of bankruptcy.

(2) Application for receiver.

The language of the act contemplates that *because of insolvency*, a receiver has been applied for by the bankrupt, or because of insolvency, a receiver (at his suit or the suit of his creditors) has been put in charge of his property under the laws of a state or of the United States.

The word "receiver" is of course used in this connection not to indicate the officer known as a receiver in a bankruptcy case.

The receivership proceedings must be on account of insolvency. Receiverships of corporations or partnerships are not uncommon for other purposes, as in cases of mismanagement, fraud, etc.

To give the bankruptcy court jurisdiction there must be insolvency when the receiver is appointed and when the petition is filed.[91]

91. In re Sedalia Farmers Co-Op. Packing & Produce Co., (D. C. Mo.) 268 Fed. 898.

Sec. 42. ADMISSION OF INSOLVENCY AND CONSENT TO BANKRUPTCY. **This act consists in having "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."**

This is a sort of voluntary bankruptcy—a sort of "confession of judgment." Generally one willing to become a bankrupt would file his own petition in bankruptcy.

In this act of bankruptcy insolvency, as defined by the bankruptcy act is immaterial.[92]

The board of directors have authority to make this admission.[93]

92. In re Dressler, Producing Corp., (C. C. A. 2nd Cir.) 262 Fed. 257.

93. Id.

CHAPTER 5.

THE PETITION AND PROCEEDINGS THEREON.

Sec. 43. VOLUNTARY PETITIONS. The voluntary petition should be made out on the official forms itemizing the assets, and the indebtedness and claiming the bankrupts exemption.

A voluntary petition in bankruptcy is made out upon the Official Form No. 1. Schedule A attached to the petition itemizes the debts. Schedule B itemizes the assets and claims the exemptions.

Upon the filing of this petition in proper form adjudication follows as a matter of course. A reference to a referee is made, a date for the first meeting of the creditors is set, and a trustee elected if assets exceed exemptions.

Sec. 44. INVOLUNTARY PETITIONS. The involuntary petition must allege an act of bankruptcy and must show that the debtor is subject to the jurisdiction of the court. It must be signed by three creditors if there are twelve or more creditors. If less than twelve, a single creditor may file. But the petitioning creditor or creditors must have claims aggregating five hundred dollars or over and the bankrupt must owe one thousand dollars or over. The petitioning creditors must have provable debts.

(1) Who may file petition.

(a) *Number of creditors.* "Three or more creditors who have provable claims against any person which

amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."[94]

If the petition avers that the creditors are less than twelve in number and is filed by less than three creditors, and the answer avers there are more than twelve, the answer must be accompanied with a list of the creditors with their addresses, and the court shall delay the hearing and notify such creditors to come in and if prior to or during the hearing other creditors join, the petition shall be sufficient. Otherwise it shall be dismissed for lack of sufficient creditors.[95]

These three creditors are jurisdictional—"the law is now well settled beyond dispute that the existence of three provable claims held by three petitioners, respectively of the alleged bankrupt, and if challenged by pleading, plenary proof thereof is jurisdictional and indispensable to the maintenance of an unvoluntary petition in bankruptcy."[96]

(b) *Character of creditors*. A creditor is not qualified as a petitioning creditor unless he has a *provable* claim.[97] Hence a *preferred* creditor cannot be counted unless he surrenders his preference.[98] Hence, a *secured* creditor cannot be counted except to the extent his claim ex-

94. Bankr. Act, 1898, Sec. 59b.

95. Id. Sec. 59d.

96 Cutler v. Nu-Gold Ring Co., (C. C. A. 8th Cir.) 264 Fed. 836.

97. Bankr. Act, 1898, Sec. 59b.

98. Stevens v. Nave-McCord Mercantile Co., 17 A. B. R. 609.

ceeds his security.[99] Unless he waives his security and turns it in for the benefit of the estate generally.[100]

(2) What petition must allege.

(a) *That debtor is a person against whom a petition may be filed under the law.* The petition must allege that the party against whom the petition is filed is not within the exempted occupations or kinds of businesses. The court has no jurisdiction over such persons or corporations. It is as to them as if no bankruptcy act existed.[101]

(b) *That an act of bankruptcy has been committed.* The petition must show that an act of bankruptcy has been committed. It must state the specific facts relied on, with time, place and circumstances, so that the alleged bankrupt may know what he is required to answer.[102] For instance if a preferential payment be alleged, the allegation must show that thereby one creditor obtained a greater preference than those in the same class.[103]

Sec. 45. THE ADJUDICATION; FIRST MEETING OF CREDITORS; ELECTION OF TRUSTEE. In voluntary bankruptcy adjudication follows the filing of the petition as a matter of course; in involuntary bankruptcy it follows if the bankrupt defaults or follows the finding against him if

99. Emerine v. Terault, 34 A. B. R. 55.
100. Morrison v. Rieman, 41 A. B. R. 325.
101. Vallely v. Northern Fire Ins. Co., 245 U. S. 347.
102. Clarke v. Henne & Meyer, (C. C. A. 5th Cir.) 127 Fed. 288.
103. Mills v. J. H. Fisher & Co., 159 Fed. 897, 16 L. R. A. N. S. 656.

he pleads. Thereupon the creditors hold their first meeting, examine the bankrupt and elect the trustee.

(1) Adjudication of bankruptcy in voluntary cases.

If the petition and schedules showing assets and liabilities are in due form, a reference is made and adjudication follows as a matter of course.

(2) Adjudication in involuntary cases.

If the bankrupt has no defense, he defaults and the adjudication follows. He may attack the petition for insufficiency in form, as lacking the necessary allegations, or may depend upon an issue of fact, as that he is a farmer or a wage earner, or that he did not commit the act of bankruptcy alleged, or that he is or was not insolvent. He is entitled to a jury. In case the issues are found against him he is adjudicated a bankrupt.

(3) First meeting of creditors.

Upon adjudication, the date for the first meeting is set by the referee and creditors notified. They attend for the proof of their claims, the election of the trustee and the examination of the bankrupt. The examination of the bankrupt and the questions he must answer is discussed elsewhere.

(4) Election of trustee.

At this first meeting the trustee is elected by vote of the creditors holding the majority in number and amount of claims.

Sec. 46. DUTIES OF TRUSTEE. The trustees' duties in the administration of the estate are set out in detail under the bankruptcy act.

The Law provides:[104]

Duties of trustees. (a) Trustees shall respectively

(1) Account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereof; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.

(3) Deposit all money received by them in one of the designated depositories;

(4) Disburse money only by check or draft on the depositories in which it has been deposited;

(5) Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

(6) Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) Lay before the final meeting of the creditors detailed statements of the administration of the estates;

104. Sec. 47.

(8) Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

(9) Pay dividends within ten days after they are declared by the referees;

(10) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court, as soon as practicable after their appointment.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

(c) The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

CHAPTER 6.

THE TRUSTEE'S TITLE.

Sec. 47. AS OF WHAT DATE IN RESPECT TO BANKRUPT'S OWNERSHIP. The trustee takes title to the property owned by the bankrupt at the time the petition in bankruptcy is filed.

The trustee in bankruptcy takes title to all the property of the bankrupt which might have been seized by his creditors for the payment of his debts, and which was owned by him when the petition in bankruptcy was filed. The line of cleavage in respect to the property which is subject to division among the bankrupt's creditors, passes through the day the petition is filed.[105] It is on that day, so to speak, that the bankrupt begins a new life. The property he has theretofore owned goes to his trustee for division among creditors; the property he thereafter acquires becomes his own.

Even if he acquires property prior to the adjudication but after the petition is filed, it belongs to him, and does not pass to the trustee. Creditors can get no advantage of it.[106]

A very interesting illustration of this rule arose in a recent case.[107] A debtor owed $4,300 on a note held by a bank. His mother was ninety-eight years of age and had provided a legacy for him in her will amounting to $20,000. The debtor filed a petition in bankruptcy.

105. Jones v. Springer, 226 U. S. 143.
106. Sibley v. Nason, 196 Mass. 125.
107. Bank of Elberton v. Swift, (C. C. A. 5th Cir.) 268 Fed. 305.

Shortly thereafter his mother died and he became entitled to the legacy. The bank filed a petition to set aside the adjudication alleging the filing of the proceedings was a fraud on the bank. But the court held that the bankruptcy act gave one a legal right to file a petition in bankruptcy with the effect of discharging then existing claims out of the division of his then existing property. Property acquired after the filing of the petition did not pass to the trustee. Even though the will then provided for the legacy, it was not then his. Of course the bankruptcy law, as the court remarked, was not intended for situations of the sort in question. And a debtor who would so use it to evade an honest debt under such circumstances may well deserve our censure. But the hardship of a particular case does not justify the court in overriding the plain provisions of the law.

But it is not necessary, however, that the bankrupt have possession or right of possession in order that the trustee may take. It is simply necessary that the bankrupt, at the time of filing the petition, have a *vested interest*. Thus if he were the owner of property subject to a life estate of some one else, he would have property that he could sell and which his creditors could seize. Clearly it would be an asset, possibly a very valuable one, for the trustee in bankruptcy. This principle is very strongly shown by the following case:[108] A debtor was an insurance solicitor. He sold a considerable amount of insurance upon which he became entitled to commissions upon future premiums. A petition in bankruptcy was filed. Held: that as these commissions were already earned although not yet payable, and although contingent upon the premiums being payable, they constituted

108. Matter of Wright, 19 A. B. R. 54.

property belonging to the bankrupt upon the filing of his petition and passed to the trustees in bankruptcy.

The trustee when elected gets title to the property owned by the bankrupt when the petition is filed. Where is the title in the meantime? The Supreme Court has said: "While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust, until the appointment and qualification of the trustee. * * * Until such election, the bankrupt has title,—defeasible, but sufficient to authorize the institution and maintenance of a suit or any cause of action otherwise possessed by him."[109]

A *receiver* may be appointed to take charge of such property pending the election of the trustee where necessary to the preservation of the estate.

Sec. 48. TRUSTEE AS REPRESENTATIVE OF CREDITORS. A trustee becomes clothed with "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings" and also "shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." [110]

Under the law as originally drafted, a strict construction thereof by the courts led to the conclusion that the trustee merely succeeded to the title of the bankrupt, and represented the creditors only to assert rights that they could have asserted in the then condition of their

109. Johnson v. Collier, 222 U. S. 538.
110. Sec. 47a 2 as amended in 1910.

claims. To be more specific, suppose a general creditor had to obtain a lien of a judgment or attachment before he could attack unrecorded chattel mortgages or other liens. The filing of the petition in bankruptcy gave the trustee no better right than the creditor then had *as* general creditor, unless in fact at that time he were a judgment or attaching creditor. This construction of the act was highly unfortunate. Clearly a creditor ought not to be deprived of a position he could have taken had there been no proceedings. For instance, suppose A was a general creditor of X, and B had an unrecorded chattel mortgage on property in X's possession. B by recording this mortgage before A obtained judgment can have precedence over A even if B's debt is later than A's because A has been content to be a general creditor, while B has obtained a lien. But if A gets a judgment before B files his lien or before B takes possession of the property, A has a prior lien. But suppose that A instead of getting judgment joins in a petition in bankruptcy, or other creditors file a petition, or X files the petition himself. A ought not in that event to have an inferior position than he would have had. As the creditors rights are fixed by the filing of the petition as of the date thereof, the trustee ought in all justice to be able to assert as of that date all rights which the creditors might have placed themselves in a position to secure on that date. And by the amendment of 1910, such is now the law. The filing of the petition puts the trustee in the position of a judgment creditor with the superior advantages of such, even though none of the creditors are judgment creditors.

For example under the law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens a lien upon the property by

execution, attachment or like legal process before the contract is filed for record. If bankruptcy proceedings intervened prior to its being filed for record, the conditional sale would thereby become void as to the trustee. If the conditional sale were filed prior to the filing of the petition and prior to any creditor getting a judgment or other legal process, the rights of the conditional vendor to re-assert his title upon breach of the condition would be made effective. And this even if the filing was immediately prior to filing the petition. It would not be void as a preference because it would not be a preference.[111]

Sec. 49. AS TO NATURE OF PROPERTY. The trustee gets all the property of the bankrupt (except his exemptions) which has any value as an asset for the payment of his debts.

After the enumeration of the specific kinds of property passing to the trustee, section 70 of the act concludes by the general provision.

"Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Generally, we may say, by authority of this language, that a trustee takes title to all property, except his exemptions, that would have been of any value to the creditors of the bankrupt had not bankruptcy intervened, and all property, except the exemptions of the bankrupt, which is of a transferrable sort.

The trustee gets title not only to the property which the bankrupt has in his possession but all property in the hands of others; and he is clothed by law with the

111. Bailey v. Baker Ice Mach. Co., 239 U. S. 268.

right to sue as the representative of the bankrupt, to enforce the rights of the bankrupt which existed at the time of filing the petition the enforcement of which results in assets for the creditors.

Sec. 50. SAME SUBJECT—PERSONAL PRIVILEGES. The bankrupt's property which his creditors could not have reached by process, and which could not be transferred by him does not pass to trustee.

If a bankrupt enjoys title to property which is in the nature of a personal privilege, and has no transferrable value, a trustee takes no title thereto. Thus a saloon license if purely personal does not pass to the trustee.

If, however, there is a right of transfer, even though there may be restrictions upon it which may in fact defeat it, the subject matter is property passing to the trustee. Thus it was generally held in liquor license cases, that the license passed to the trustee if it could have been transferred by the bankrupt, although subject to the consent of the authorities.[112]

This doctrine is forcibly exemplified by the facts in stock exchange membership cases. Such memberships are not transferrable except with the consent of a certain percentage of the members. The transfer may therefore be impeded. Nevertheless, such memberships are held to be assets passing to the trustee in bankruptcy for him to realize upon if he can.[113]

These memberships frequently have a value of many thousands of dollars and are bought and sold. The

112. Matter of Doyle & Son, 31 A. B. R. 571.

113. Page v. Edmunds, 187 U. S. 596; Board of Trade v. Weston, 40 A. B. R. 263.

possibility of the sale being defeated by an adverse vote, does not deprive the trustee of the asset.

Sec. 51. INTERESTS IN PATENTS, PATENT RIGHTS, COPYRIGHTS AND TRADE-MARKS. These are specifically given by Section 70 of the Act.

The law provides that interests in patents, patent rights, copyrights and trade-marks pass to the trustee.

Sec. 52. INSURANCE POLICIES. Insurance policies which are assets to the bankrupt pass to the trustee, but the bankrupt can prevent this by paying the cash value to the trustee.

Insurance policies (unless exempt by local law) if they have a cash value, pass to the trustee.

If they have no surrender value they do not pass.[114]

If they are exempt by the local law they do not pass.[115]

If the bankrupt has named a beneficiary therein other than himself or his estate, the policy will nevertheless pass if the bankrupt has reserved power to change the beneficiary.[116] This is true although the policy provides for the consent of the insurance company to such change.[117]

An insurance policy is a peculiar species of property from the fact that it may have a value which cannot possibly be replaced. The insured may have become a bad risk, and rates increase with age. Hence the right of the bankrupt to substitute the cash surrender

114. Burlingham v. Crouse, 228 U. S. 459.
115. Holden v. Stratton, 198 U. S. 202.
116. Cohen v. Samuels, 245 U. S. 50.
117. In re Greenberg, (C. C. A. 2nd Cir.) 271 Fed. 258; In re Jens, (D. C. Ia.) 273 Fed. 606.

value for the policy is expressly recognized by the act, which provides:

"That whenever any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash value has been ascertained * * * pay or secure to the trustee the sum so ascertained, and continue to hold, own and carry such policy free from the claims of creditors. * * * ." 118

Sec. 53. PROPERTY HELD BY BANKRUPT IN TRUST OR NATURE OF TRUST. Property held by bankrupt in trust does not pass to the trustee.

(1) In general.

The property to which the bankrupt has title as trustee, does not pass to the trustee in bankruptcy. We are now speaking, not of those cases of property held by the bankrupt but belonging to another, but to those cases in which the bankrupt has legal title to property, but charged with a trust in favor of another. Such property so owned in trust does not pass to the trustee in bankruptcy, for, though he owns the legal title, the beneficial, equitable or real ownership is in another.

We may make a division of such cases into those which we may term express trusts, and those in which the trust is an implication from the circumstances.

(2) Express trusts.

The trustee in bankruptcy gets no title to property held upon express trust. Thus where a bankrupt held

118. Bankr. Act 1898, Sec. 70, d. 5

under a will devising him property in trust for others, this does not become a part of the bankrupt estate.[119]

(3) Implied trusts.

Property that by reason of the circumstances becomes impressed with the character of a trust, does not become a part of the estate to become administered in bankruptcy, but may be reclaimed by the beneficial owners.

Thus it has been held that where a corporation declared a dividend, and set the fund aside for the payment of the dividend, and thereafter went in bankruptcy before the dividend was paid, the fund was impressed with a trust, and was payable in full to the stockholders entitled thereto.[120]

(4) Identification of trust fund.

It is necessary in such cases that the fund claimed be one that can be identified. If the identity becomes lost by its intermixture generally with the bankrupt's other funds, there is no right to assert the trust against the general funds. The trust property must be traced and identified.[121]

While this is the general rule, it has also been held that where the trust moneys have been deposited in a general account, and this account does not fall below the amount held in trust, the trust money will be presumed to be a part of this larger fund, and may be reclaimed in full by the beneficiaries.[122]

119. City National Bank v. Slocumb, (C. C. A. 6th Cir.) 272 Fed. 11.)

120. In re Interborough Consol. Corp. (D. C. N. Y.) 276 Fed. 914.)

121. Schuyler v. Littlefield, 35 A. B. R. 209.

122. So. Cotton Oil Co. v. Elliotte, (C. C. A. 6th Cir.) 33 A. B. R. 375.

And it has been held that where a stockbroker who goes into bankruptcy has had stock on hand belonging to a customer, and has upon his bankruptcy certificates for that stock, not belonging to someone else although not the identical certificates delivered by or bought for the customer, they are reclaimable by the customer as his property and do not constitute a part of the general estate. This is upon the theory that the property owned by the stockholder is stock of the corporation and the certificates are but the evidence thereof.[123]

Sec. 54. PROPERTY TRANSFERRED OR MONEY PAID AS A PREFERENCE. Where property is transferred or money paid by the bankrupt within four months preceding the filing of the petition in bankruptcy, and the recipient knew or had reasonable cause to know that a preference was intended, the transaction may be set aside by the trustee.

Inasmuch as a main object of the bankruptcy law is to secure an equal distribution of the bankrupt's estate among his creditors, it follows that this object could be easily defeated if we should allow the bankrupt upon becoming insolvent to make a payment or a transfer of property to one or several of his creditors which would stand against the trustee when appointed. Consequently, the law provides that payments which amount to preferences within a period of four months prior to the time the petition is filed shall be set aside upon suit by the trustee for that purpose, provided the creditor to whom such preference was made knew or had reasonable cause to know that a preference was intended.[124] He does have reasonable cause to believe that

123. In re Solomon & Co. (C. C. A. 2nd Cir.) 268 Fed. 108.
124. Bankr. Act, 1898, Sec. 60b.; First National Bank v. Galbraith, (C. C. A. 8th Cir.) 271 Fed. 687.

a preference was intended whenever he knows that the debtor is insolvent.[125] We do not inquire as to preferences made before the four months period because there being nothing illegal or immoral about a preference, it would tend to unsettle business too much to allow payments to be inquired into except as made in reference to the bankrupt's present financial condition and therefore the law limits the inquiry to the short period of four months prior to the time a petition is filed.

Any conveyance made which would amount to giving the creditor a preference over the others, whether made in direct satisfaction of the debt or to secure it is voidable, if the creditors know or should know that a preference is intended.

As we have seen there cannot be a preference unless there is a creditor to whom it is made. Cash transactions cannot be disturbed. Thus D is insolvent, but not yet bankrupt. He buys property from A, paying A cash. A is never a creditor and the payment is not a preference. From B he borrows money giving B at the time the loan is made, a mortgage as security. The mortage cannot be disturbed. Had D bought the property from A on credit, and then paid for it the payment would be a preference because it would be a payment to a creditor. Or if B had loaned the money without security, and then had afterwards prevailed on D to secure him, that would be a preference.[126] If a mortgage is given to secure a past indebtedness and also a present indebtedness, it will be upheld to the extent of the present consideration only, provided, of course, proceedings are begun within four months. As

125. Coder v. Arts, (C. C. A. 8th Cir.) 152 Fed. 943 s. c. 213 U. S. 223; Benjamin v. Buell, (C. C. A. 7th Cir.) 268 Fed. 792; Lowell v. Ashton (D. C. Mass.) 272 Fed. 536.

126. Feilbach v. Russell, (C. C. A. 6th Cir.) 233 Fed. 412.

it has been stated before in this text (in connection with Acts of Bankruptcy) there cannot be a preference unless there is a diminution in the value of the estate.[127] And within this rule there is no preference merely because the bankrupt in his exigency may sell at a low price.

And it has been held that there is no diminution of the estate to make the act a preference where there are payments on running account, followed by new purchases, the net result of which is to increase the value of the estate. [128]

Sec. 55. FRAUDULENT CONVEYANCES. A conveyance made by a debtor in fraud of his creditors may be set aside by the trustee in bankruptcy.

We have seen that fraudulent conveyances may be grouped under two headings: Those without consideration, and those for value. In the first case, the conveyance may be set aside because the transferee has giving nothing, when the giver was at the time insolvent and therefore had no right to deprive his creditors of their debts, by giving away his property; in the second case, we found that the transfer was avoidable whenever the transferee was a party to the fraud. In both of these cases, the trustee may act for the creditors and set aside the fraudulent conveyance, as property belonging to the estate.

In Globe Bank v. Martin,[129] the court decides that when any creditor has a right to attach the transfer

127. Root Mfg. Co. v. Johnson, (C. C. A. 7th Cir.) 219 Fed. 397.
128. In re Grocer's Baking Co. (D. C. Ala.) 266 Fed. 900; Jaquith v. Alden, 189 U. S. 78.
129. Globe Bank v. Martin, 236 U. S. 288; In re Kohler, (C. C. A. 6th Cir.) 159 Fed. 871.

as fraudulent, the trustee may do so, and the assets so recovered become assets for the benefit of all the creditors even though some of them might not have had the right to set aside the conveyance under the state statute. In this case, the Kentucky statute, which was relied upon by the trustee as giving him his right, as it was such statute through which the creditors would have to have proceeded, gave the right to *existing* creditors for their benefit, and not to future creditors, but the court decided that where such existing creditors had not perfected their lien by proceedings brought more than four months prior to the bankruptcy, all creditors including creditors becoming such after the fraudulent transfer, would share in the assets.

The right to set aside a fraudulent transfer is not, however, limited (as in the case of avoidable preferences) to four months. The question is, have the creditors when the petition is filed a right, under the state law, to set aside a fraudulent transfer. If so, the right passes to the trustee in bankruptcy.[130]

A transfer may be fraudulent even when not so *in fact*, if under the rules of law it is to be deemed fraudulent by reason of the facts. Thus under the "Bulk Sales Act" of some states a transfer of a stock in trade is made fraudulent as to creditors and voidable by them unless the creditors of the seller are given notice before the consideration passes. Such a transaction could therefore be attached by the trustee who would succeed to the rights of the creditors in that respect. So where a seller sells personal property under absolute sale and retains possession, this is deemed absolutely fraudulent in some states, and in others presumptively fraudulent, as to the creditors of the seller. The trustee would

130. Stillwegen v. Clum, 245 U. S. 605.

succeed to the rights of the creditors of such seller in the event of his bankruptcy.[131]

Sec. 56. PROPERTY HELD BY BANKRUPT CLAIMED BY THIRD PERSON.[131a] Property held by bankrupt and claimed by third person does not pass to trustee if the third person could have claimed it against the creditors.

Property held by the bankrupt which is owned by third persons must be delivered to them except where the creditors, had there been no bankruptcy, could have ignored the real ownership and levied upon it as the bankrupt's property.

The proceedings to recover such property are known as Reclamation Proceedings.

(1) Property held by bankrupt as bailee.

Property in the bankrupt's hands which he holds merely as a bailee, does not pass to the trustee but may be reclaimed by the owner. It is everywhere the law that merely putting one's property in another's possession for lawful purposes does not estop the owner from asserting his title to such property as against the creditors of the party who has the possession. The exigencies of commerce require this to be the law. Property must be placed with others for various purposes—it may be *loaned* to another; it may be *left for safe keeping or on deposit;* it may be placed with another for *repairs;* it may be left with another as *collateral;* it may be to enable the other as a means to accomplish his agency (as a sample case); it may be *consigned* to another for sale by him for the use of the consignor. In these and other

131. See In re Robinson Machine Co. (D. C. Mich.) 268 Fed. 165.

131a. For property held by bankrupt in trust see Sec. 53.

cases of bailment—i. e. where there is transfer of possession only and not of ownership—the bankruptcy of the bailee (party in possession) does not operate to divest the bailor of his right to the property, for he is the owner thereof. He is entitled to the specific goods.

(2) Consignments.

A consignment is a bailment and included under the general rule of the above paragraph, but may be specially mentioned because it so frequently arises. A consignment exists where goods are sent to another to be sold by him, for the consignor and in effect as the consignor's agent, all unsold goods to be returned to the consignor. It must be distinguished from a sale on *credit*, in which case the title passes to the purchaser and the seller becomes a general creditor. It must also be distinguished from a *conditional sale* in which the vendor retains title though giving possession to the vendee, but retains it merely for purposes of security. A consignment exists whenever the vendor retains title generally, making the vendee merely his agent for purposes of selling the goods, remitting the proceeds (less his commission) and returning all goods that are unsold. The fact that the consignee pays the freight, rent, insurance and other expenses, will not prevent the transaction from being on consignment.

If the goods are on consignment the consignor may reclaim them in bankruptcy.[132]

(3) Property acquired by bankrupt as conditional vendee.

Conditional sales in which the property is delivered to the buyer and title for purposes of security is retained

132. In re Columbus Buggy Co. 142 Fed. 159; Franklyn v. Stoughton Wagon Co. 168 Fed. 857.

in the seller are transactions which are good in all their provisions when only buyer and seller are involved, but to be good in most states against creditors must be recorded. Therefore if not recorded, the trustee takes title to property so purchased by the bankrupt, although the seller has for purposes of security reserved title. In Illinois, recording such a transaction will not keep creditors from levying on the property as assets of the buyer and the trustee gets title.

Illustrating this section, A sells and delivers property to D, and to secure himself for all or part of the unpaid purchase price makes it a part of the contract of purchase that he shall retain the title until D has paid as agreed upon. In this case D has the apparent ownership and in most states, A cannot enforce his title where the rights of third persons intervene unless he has recorded the transaction, just as he must record chattel mortgages. Unless recorded, therefore, the trustee gets title.[133]

(4) Property owned by bankrupt subject to chattel mortgage.

A chattel mortgage must be properly executed and recorded, or possession taken thereunder in order to be good against third persons. If the petition is filed before this is done, the property is not subject to the chattel mortgage in the hands of the trustee; and also if judgment creditors procure liens prior to the recording of the chattel mortgage or the taking of the possession, they have superior rights over the chattel mortgage which the filing of the bankruptcy petition will not

133. In re Nelson, (D. C. S. Dak.) 191 Fed. 233; In re Mina, (D. C. Pa.) 270 Fed. 969.

deprive them of even if it does dissolve their liens for the purpose of making them general creditors.

(5) Property held in trust by bankrupt. (See Sec. 53.)

Sec. 57. PROPERTY HELD BY THIRD PERSON BELONGING TO BANKRUPT. In general any property which the bankrupt could demand as his property from third persons, the trustee can demand as the property to which he becomes entitled for purposes of administration.

(1) In general.

Whatever belongs to the bankrupt, except his exemptions, passes to the trustee, as we have seen (subject, of course, to all valid liens held by third persons), no matter in whose possession it may be.

(2) Property of bankrupt on consignment with another.

This belongs to the bankrupt and the trustee can reclaim it.

(3) Property bailed for other purposes.

Wherever the property of the bankrupt is in other hands on any sort of bailment, it passes to the trustee subject to valid liens of those who possess it.

(4) Recovery of property in other's possession.

Where property is adversely held and not given up upon demand, the necessity of a plenary suit to recover it has been discussed in another connection.

Sec. 58. RIGHTS TO SUE. The trustee may sue upon any claim for damages to the bankrupt's property, or arising out of a contract, express or implied.

Whenever, at the time of the filing of the petition, the bankrupt has a right to sue on account of injuries to his property, or for breach of, or to enforce contracts, express or implied, the trustee may sue on such rights, or if suit is already pending may become a party of the suit and prosecute it for the benefit of creditors.

Thus a trustee of a bankrupt corporation can enforce the stock liability of its stockholders.[134]

If the right to sue, or the pending suit is for personal injury, as distinguished from property injury or injury to the estate, the trustee does not succeed to the rights of the bankrupt.

Thus in Sibley v. Mason,[135] plaintiff was suing for personal injuries when he was made bankrupt. Objection was made to his right to prosecute the suit. The court *held* that such a cause of action did not pass to the trustee.

If the judgment had been recovered prior to the institution of the bankruptcy proceedings, the right to its collection would pass to the trustee.

Sec. 59. BURDENSOME PROPERTY: TRUSTEE MAY REJECT. A trustee may elect to reject property of a burdensome nature.

The trustee may reject title to property which is of no value to the estate. "It is well settled that assignees in bankruptcy are not bound to accept property which,

134. In re Eureka Furniture Co., (D. C. Pa.) 170 Fed. 485; Petition of Stuart, (C. C. A. 6th Cir.) 272 Fed. 938.

135. 196 Mass. 125.

in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefitting the estate, and can elect whether they will accept or not, after due consideration and within a reasonable time, while if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course."[136] This was prior to the act of 1898, but is the accepted principle applied under the present act.[137] For instance, a lease having no value as a convertible asset, may be rejected by the trustee so that the title remains in or reverts to the bankrupt.[138]

Sec. 60. TO WHAT LIENS TRUSTEE'S TITLE IS SUBJECT. The trustee takes subject to all liens, except judicial liens acquired within four months prior to the filing of the petition in bankruptcy, and except liens constituting preferences within such four months.

(1) In general.

It is not the intention of the bankruptcy to take from a lien creditor his advantage. A trustee takes subject to all valid liens that general creditors or subsequent lien creditors would have to recognize if there were no bankruptcy proceedings, with *two* general exceptions; *first:* judicial liens acquired within four months immediately prior to the filing of the petition are dissolved; and *secondly*, liens acquired within such four months' period to secure existing debts, are dissolved as constituting preferences.

Let us consider in more detail.

136. Dushane v. Beall, 161 U. S. 513.
137. In re Geo. F. Scruggs, (D. C. Ala.) 31 A. B. R. 94.
138. Watson v. Merrill, (C. C. A.) 136 Fed. 359.

(2) Liens secured through judicial proceedings within four months.

If a lien is acquired by obtaining a judgment or making an attachment or other judicial process, within four months immediately prior to the filing of the petition, it is dissolved by the bankruptcy proceeding. That is, the judgment or attaching creditor becomes in the bankruptcy court merely a general creditor, with no advantage over other general creditors by reason of his lien. The reason for this provision in the law is very obvious. A main intention of the bankruptcy law is to secure a division of a bankrupt's estate equally among general creditors. If a general creditor merely by being more diligent in getting a judgment or levying an attachment, could thereby fix a lien on the insolvent estate he would frequently take everything, leaving the other general creditors with no remedy. Therefore, the law wisely provides that the lien of a judicial proceeding given by state law is dissolved by the bankruptcy proceeding, if it was obtained within the preceding four months, that period being taken as the limit of the present time in the bankrupt's life.

"Had Congress enacted other than it did in these plain words, or had courts by construction, given any supposed limitation to those plain words, and thereby had intra four months liens been allowed to take away the assets which passed to the bankruptcy court by the filing of the petition in bankruptcy, the power of the court to administer bankrupt estates would have been absolutely defeated."[140] In this latter case it was held that the dischargeability of the debt under the bank-

139. Metcalf v. Barker, 187 U. S. 165.

140. Wagner v. Mt. Carmel Iron Works, (C. C. A. 3rd Cir.) 270 Fed. 80.

ruptcy proceedings was immaterial to the question whether the lien was dissolved.

(3) Judicial liens secured prior to four months.

If the lien of an attachment, judgment or other judicial process, was acquired more than four months ago when the petition is filed, it will not be affected by the bankruptcy proceeding and the creditor will have the advantage of his lien over general creditors and over subsequent lien holders. This is for the reason that it is considered far enough back not to have been acquired as any unjust advantage over the bankrupt's present general creditors.

Thus in the case of Metcalf v. Barker, the court said: "In our opinion the conclusion to be drawn from this language (of the statute, section 67f, Bankr. Act 1898) is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on its adjudication, but its validity is recognized. When it is obtained within the four months the property is discharged therefrom, but not otherwise."

(4) Liens arising out of contract at inception of indebtedness.

Such liens are good and will prevail against the trustee no matter when acquired. Thus D borrows money from C and to secure him gives him a mortgage on his real estate, or pledges with him personal property, or gives him a chattel mortgage which C properly records. This lien will stand even if the lien holder understood at the time that the debtor was insolvent. As was

stated n an early case[141] "An insolvent person may properly make efforts to extricate himself from his embarrassment, and therefore he may borrow money and give at the time security therefor, provided always the transaction be free from fraud in fact, and upon the Bankrupt Act."

In such cases, there is no depletion of the estate. In return for the lien the bankrupt receives assets. This is a principle we all proceed upon and it is a necessary rule of action, for if the creditor feared he could not assert his security, he would lend no money except to those in unquestionably solvent circumstances.

Such liens, however, will not be good against the trustee, where when the bankruptcy proceedings were begun, they would not have been good against creditors, because not properly recorded, or possession taken under them.[142]

(5) Liens arising out of contract after inception of indebtedness.

Liens so acquired by a creditor who knows or has reasonable cause to believe that a preference is intended would be good only in case they were acquired more than four months prior to the filing of the petition, because otherwise they would be preferences.[143]

(6) Liens given by law not arising out of contract or judicial proceedings.

Liens that are allowed by the local law as good against general creditors, are not dissolved in the event of

141. Daily v. Inst., 1 Dill. 144, Fed. Cas. 3571.
142. In re Buchner, (D. C. Ill.) 202 Fed. 979.
143. Stedman v. Bank, 117 Fed. 937 (holding that a chattel mortgage given in part to secure a past, and in part to secure a present indebtedness, is voidable *pro tanto* only.)

bankruptcy, but by permission of the act are allowed to stand.

Such are liens of bailee's, mechanic's liens, etc. The fact that they must (for instance, mechanic's liens) be enforced in judicial proceedings, does not make them judicial liens and they are not to be so classed.

Thus A delivers lumber to B to be used by B in building a house on B's property. The local statute gives to a person who furnishes material for the improvement of real estate a lien called a mechanic's lien. This lien is good in bankruptcy.[144]

(7) Equitable liens.

In a proper case where it is equitable to fasten a lien upon a debtor's property in favor of a creditor who, although having no legal lien, has a claim that ought to be fastened upon some particular property of the bankrupt, a court of bankruptcy as a court of equity will allow and enforce such lien.[145]

(8) Right of court to order property sold free of liens not voidable.

The bankruptcy court has the implied power to sell property which is subject to liens sold free of the liens, the proceeds to be held subject to the lien. Such a sale operates as a foreclosure and gives the purchaser good title free of the lien.[146]

144. In re Bennett, (C. C. A. 6th Cir.) 153 Fed. 673. In re Laird, (C. C. A. 6th Cir.) 109 Fed, 550 (statutory labor lien); Henderson v. Mayer, 225 U. S. 631.

145. In re Plantations Co., (D. C. Pa.) 270 Fed. 273; Boise v. Talcott, (C. C. A. 2nd Cir.) 264 Fed. 60.

146. Gantt v. Jones, (C. Ç. A. 4th Cir.) 272 Fed. 117.

(9) Preservation of voidable liens for benefit of estate.

If a lien is of the kind dissolved by the bankruptcy proceedings (liens operating as preference, liens secured by judicial process within four months period) the court may order it to be preserved for the benefit of the estate.[147] For instance, suppose Debtor gives a chattel mortgage to M to secure a present loan, but M does not record it. J then gets a judgment against Debtor. Afterwards M records the chattel mortgage, and Debtor then goes into bankruptcy, all happening within four months. The bankruptcy deprives J of his judgment lien, but it will be preserved for the benefit of the estate, to prevent M's lien from being good.

147. Bankr. Act, 1898, Sec. 67 (3); In re Martin, 236 U. S. 288.

CHAPTER 7

CLAIMS AGAINST ESTATE.

Sec. 61. In general.

The subject of claims against the bankrupt estate involves: A. What claims provable in bankruptcy; B. Proof and allowance of claims; C. Secured and lien claims; D. Claims having priority; E. Claims of preferred creditors; F. Dividends on claims; G. Compositions with creditors; H. Set offs.

The subject of Discharge of Claims is covered in a separate chapter.

If a claim is provable in bankruptcy, it will be discharged (unless one of the exceptions) whether actually proved or not if the creditors have notice.

A. What Claims Provable in Bankruptcy.

Sec. 62. IN RESPECT TO WHETHER DUE OR NOT. All claims which are of a provable kind are provable and allowable whether due or not.

In bankruptcy, it is not necessary that a claim be due in order to be proved. It need only be *owing*.[148]

148. Germania S. B. & T. Co. v. Loeb, (C. C. A. 6th Cir.) 188 Fed. 285; In re Percy Ford Co. (D. C. Mass.) 199 Fed. 334.

Sec. 63. IN RESPECT TO WHETHER OWING BEFORE OR AFTER THE PETITION IS FILED. A claim is not provable unless it is owing before the petition is filed.

A claim need not be mature but at least must be owing before the petition is filed. As the trustee takes the title to property owned by the bankrupt prior to the filing of the petition and not property acquired after that time, so claims arising before but not after the filing of the petition are provable. As stated, they need not be due, but they must be owing. The line of cleavage between the old and the new life both in respect to property going to the trustee and debts dischargeable is through the day the petition is filed. It is true of course that costs of administration, etc., arising after the petition is filed are payable out of the assets in the hands of the trustee. This must be so in the nature of the case.

Sec. 64. CLAIMS BASED UPON JUDGMENTS. A claim consisting in a judgment secured prior to the filing of the petition is a claim provable in bankruptcy.

Considering now a judgment irrespective of its effect to give a lien (and the lien thereof is dissolved when the judgment is entered within the four months' period) such judgment represents a claim that is provable as a debt of the estate.

Sec. 65. FIXED LIABILITIES AS EVIDENCED BY WRITTEN INSTRUMENTS. Notes and debts due under written instruments are provable in bankruptcy.

This is the express provision of the law. These, with indebtedness for goods sold, for services rendered, and

on open account, make up the vast majority of commercial claims.

Sec. 66. RENTS TO ACCRUE. Rents to accrue are not provable.

Rent which has accrued prior to the filing of the petition is provable against the estate, but rent to accrue thereafter is not provable.[149]

Sec. 67. CLAIMS FOUNDED ON OPEN ACCOUNTS. Such are provable.

The act recites that claims founded on "open account" are provable.

Sec. 68. CLAIMS ARISING UPON ANY CONTRACT EXPRESS OR IMPLIED FOR THE PAYMENT OF MONEY.

Under this provision a claim for damages arising out of the breach of a contract, has been sustained.[150]

See next section that claims arising out of tort, not reduced to judgment, are not provable, but if it is a case in which the party damaged may elect to sue in tort or in contact, he may "waive the tort and sue in contract."[151]

Is the act of bankruptcy a breach of an executory contract where such bankruptcy makes it impossible for the bankrupt to perform? And, if so, are the damages thereby sustained, provable in bankruptcy? This has

149. In re Mullins Clothing Co. (D. C. Conn.) 230 Fed. 681.
150. In re Stern, (C. C. A. 2nd Cir.) 116 Fed. 604.
151. First Nat. Bk. v. Bamforth, 37 A. B. R. (Vt.) 315; 269 Fed. 123, 251 U. S. 239.

been a mooted question, but some late decisions seem to favor it. In Central Trust Co. v. Chicago Auditorium, 240 U. S. 581 (1916) the court says: "it must be deemed an implied term of every contract that the promisor will not permit himself through insolvency or acts of bankruptcy to be disabled from making performance." And the court held that the bankruptcy (although involuntary) constituted a breach and damages were provable. See also Heyward v. Goldsmith, (C. C. A. 3rd Cir.) 269 Fed. 946.

Sec. 69. UNLIQUIDATED CLAIMS. (1) WHEN PROVABLE. If a claim is unliquidated at the time the petition in bankruptcy is filed, it may thereafter be liquidated, proved, and allowed, provided it is in the class of provable claims.

Sec. 63 of the Act after reciting the sorts of claims that are provable provides: "Unliquidated claims against the bankrupt may, pursuant to application to the court be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

This has always been construed to mean merely that if claims of the kind mentioned above this provision (see Sec. 64-68 supra) are unliquidated, they are not for that reason not provable, but may be liquidated and proved; but this paragraph does not mean to allow generally all unliquidated claims. It does not include a *new class* of claims, but merely refers to the claims enumerated in the act.

Accordingly it has been held that there is no right to prove against the estate for damages arising out of the commission of a tort. See next section.

But damages arising out of breach of contract can be liquidated by the bankruptcy court and proved.

Sec. 70. UNLIQUIDATED CLAIMS. (2) WHEN NOT PROVABLE. An unliquidated claim for damages for the commission of a tort, not yet reduced to judgment, is not provable.

A claim arising out of the commission of a tort, not yet liquidated by agreement or judgment, is not provable,[152] and therefore not dischargeable. But if reduced to judgment it is provable[153] and would in that event be dischargeable *unless* the injury was wilful or malicious.

Sec. 71. FINES. Fines levied as a punishment by a court are not provable.

Bankruptcy proceedings in no way affect fines adjudged against a bankrupt.

B. Proof and Allowance of Claims.

Sec. 72. HOW CLAIMS PROVED. Claims in bankruptcy are proved by filing a sworn statement of the claim in the form as provided by the bankruptcy rules of the United States Supreme Court. If objections are filed thereto, a trial is had.

If a claim is not objected to as invalid its proof consists in a statement sworn to by the claimant, made on a form as prescribed by the Supreme Court of the United States, which by the Bankruptcy Act is given the power to provide rules and prescribe forms for the regulation of bankruptcy proceedings. If a claim

152. In re N. Y. Tunnel Co. 159 Fed. 688; Brown & Adams v. United Button Co., 149 Fed. 48; 8 L. R. A. N. S. 961; Schall v. Camorrs, 251 U. S. 239; Stalick v. Slack, (C. C. A. 8th Cir.)
153. In re Wilson (D. C. Md.) 269 Fed. 845; ex parte Harrison, (D. C. Mass.) 272 Fed. 543.

is objected to, it is then necessary to support it by evidence upon a hearing, but the burden of proof is on the objecting party.

Sec. 73. ALLOWANCE OF CLAIMS. A claim being of a provable sort and being proved is allowed as a matter of course by an order of the court.

After a claim is proved it becomes necessary for the Court to allow it before the claimant is entitled to the rights of a creditor. Allowance is made by an order of Court. Often this is a general order covering all claims filed in the case.

When a claim is allowed it is, of course, not for that reason payable to the claimant, but it simply stands as a claim upon which a dividend is payable when declared.

Interest is allowable on claims.[154]

C. Secured and Lien Claims.

Sec. 74. In general.

In another connection it has been discussed (see last chapter, section 60(1)-(9) whether liens and the advantage of security is lost in bankruptcy proceedings.

Sec. 75. THE STANDING OF A SECURED CREDITOR. A secured creditor is not a creditor in bankruptcy in so far as his security covers his claim unless he surrenders the security.

A creditor holding a security is not affected by the bankruptcy proceedings in so far as his security covers

154. 267 Fed. 817.

his claim; that is to say, to that extent he does not have a provable claim and is not affected by the bankrupt's discharge.[155]

He may waive his security, although this usually would not be the profitable thing for him to do.

If his claim is not fully secured he is to that extent to be treated as other creditors.

Sec. 76. OTHER LIEN CLAIMS. If one has a lien by the state law not dissolved by the bankruptcy proceeding, he is protected in the collection of his claim to the extent of his lien.

All liens which are not dissolved by the bankruptcy proceedings are not affected by the proceedings.

D. Claims Having Priority.

Sec. 77. HOW A CLAIM HAVING PRIORITY DIFFERS FROM A SECURED CLAIM. A claim having priority differs from a secured claim in this, that it is the claim of an unsecured creditor to which the law gives priority to the claims of other general creditors.

A secured claim is one by virtue of which a claimant has a right upon certain particular property on account of his contract, as a mortgagee, pledgee, etc. A claim having priority is one which the bankruptcy law says shall be paid before other claims are paid. Claims having priority do not have priority to secured claims or to claims which give a valid lien on the bankrupt's property. The law sets up that certain claimants shall

155. As to right of Bankruptcy Court to sell the secured property not subject to the lien, and to attach the lien to the proceeds, see Sec. 60 (8).

be paid in full before dividends shall be paid on claims not having priority.

Sec. 78. WHAT CLAIMS HAVE PRIORITY. **The Act sets out the different classes of claims which have priority, as noticed below.**

Keeping in mind the meaning of the word priority as used in the bankruptcy law, i.e., that it differs from the term secured claim, or lien claim, the law provides that the following claims shall have priority in the order named, that is, the claims in one class must be paid *in full* before claims of a later class are paid, or before dividends upon claims not having priority are paid.

(1) "The actual and necessary cost of preserving the estate subsequent to filing the petition."

These are the claims that have the first priority and are to be paid in full before any other claims are paid.

(2) "The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after filing the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and the expense of one or more creditors, the reasonable expenses of such recovery."

These are second in priority.

(3) "The costs of administration."

This to include the fees and mileage payable to witnesses, and one reasonable attorney's fee for professional services rendered to petitioning creditors in involuntary cases, and to the bankrupt in voluntary cases.

These come next in order of priority and after the classes above are paid in full, are to be paid in full before the classes following are paid.

(4) "Taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality."

The law before it enumerates the classes having priority states that the court shall order the trustee to pay taxes before dividends to creditors are paid. Some doubt has arisen as to the place of taxes in the order of priority. They seem to fall at this point, i. e. after expenses of administration and fees and costs paid out by creditors.[156]

(5) "Wages due workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of the proceeding not to exceed $300 to each claimant."

These constitute the next class and if any funds remain after satisfying the previous priorities, these are entitled to be paid in full before general creditors can receive dividends, or share pro rata if the funds are insufficient to pay in full.

The word "wages" refers to compensation paid one who works for *hire*.

It would not include a manager of a business,[157] as he could hardly be said to be working for wages. Travelling or City Salesmen are entitled to priority, whether working on commission or not.[158]

156. In re Jacobson, (C. C. A. 7th Cir.) 263 Fed. 883. City v. Bird, 249 U. S. 174.

157. In re Bonk, (D. C. Mich.) 270 Fed. 657.

158. In re Dexter (C. C. A. 1st Cir.) 158 Fed. 788.

The fact that the claim has been reduced to judgment does not destroy its priority.[159]

(6) "Debts owing to any person who by the laws of the states or the United States, is entitled to priority."

Next and last of claims having priority are those which have priority by the law of the state, or of the United States. A state priority however will not govern if priority is provided for the same class of claim by the laws of the United States. Thus if a state law should give priority to wage earners for a period of six months, or for a greater amount, the bankruptcy law would govern.[160]

If a debt is due the United States it has priority by virtue of this section, as for instance against a surety on a bond given to secure performance of contracts with the United States.[161]

So a debt due the State which by the law of that state is entitled to priority, has priority under this provision.[162] And whether the state has such priority is determined by the decisions of that state, and such decisions will be accepted by the federal courts.[163]

E. Claims of Preferred Creditors.

Sec. 79. PREFERRED CREDITOR MUST SURRENDER PREFERENCE. A creditor who has received a void-

159. In re Haskell, (D. C. Mass.) 228 Fed. 819.
160. Matter of Slomka, 122 Fed. 630.
161. United States v. National Surety Co., U. S. Adv. Opinions, 1920-21 p. 21.
162. Marshall v. People of State of New York, U. S. Adv. Op. 1920-21 page 157.
163. Id.

able preference must surrender it, and may then prove his claim.

We have heretofore noted what a voidable preference is. A creditor who has been preferred, knowing that a preference was intended cannot prove any claim which may be yet unpaid until he surrenders his preference. If he is compelled to surrender his preference, he may then prove the claim and receive a dividend on it even though he did not surrender until the trustee compelled him by suit to do so.[164]

A creditor having received a preference in good faith may keep it, as we have seen. In such a case if any balance is still owing him, he cannot prove up as to it. "As we have already said, if the preference exceed the share of the bankrupt's estate which the creditor would be entitled to, he may keep the preference. If it be less he may surrender it and share equally with the other creditors. If the purposes of the statute are to be considered this is certainly not punishment, but benefit."[165]

F. Dividends on Claims.

Sec. 80. HOW PAYABLE. The Act sets out when and how dividends may be declared and paid.[166]

The general creditors receive dividends upon their claims where the assets are sufficient to pay dividends. The Court declares dividends as provided by the Act.

The referee declares dividends and directs the payment thereof.

164. Keppel v. Bank, 197 U. S. 356; Page v. Rogers, 211 U. S. 575.
165. Pirie v. C. T. & T. Co., 182 U. S. 438.
166. Bankr. Act 1898, Sec. 65.

The law provides for a first dividend to be paid within 30 days after the adjudication if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been but probably will be, allowed, equals five per centum or more of such allowed claims.

After the payment of the first dividend, the act directs the declaration of subsequent dividends "as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order."

A debtor is discharged of his debts by a discharge in bankruptcy even if his estate pays no dividends whatever.

G. Compositions with Creditors.[167]

Sec. 81. COMPOSITION MAY BE OFFERED BY THE BANKRUPT. The Bankruptcy Act for the purpose of saving the expense of full administration permits the bankrupt to offer a composition with his creditors.

A bankrupt may after the proceedings are begun offer to make a composition with his creditors. This is permitted in order to facilitate the administration of the estate and to prevent the accrual of full costs of administration. A composition with creditors is a familiar arrangement where there are no bankrupt proceedings. But such a composition differs very much from the one we are now considering because it is not in any sense compulsory on any of the creditors. A composition in bankruptcy may be put through against a dissenting minority of creditors.

167. Id. Secs. 12, 13.

Sec. 82. CONDITIONS OF THE COMPOSITION. Composition may be offered either before or after adjudication, after the bankrupt has been examined, has scheduled his debts and a list of his creditors; and will be confirmed when so offered after it has been accepted in writing by a majority of the claimants representing a majority in amount of allowed claims, and the bankrupt has deposited the amount to be paid to the creditors and to cover in full claims having priority and the cost of the proceeding, and the judge is satisfied such composition is to the best interest of creditors, and the bankrupt is not guilty of any act which would prevent his discharge in bankruptcy and the composition appears to be good faith.

The composition must originate in the offer of the bankrupt; it must be accepted by the majority of the creditors;[168] and it must be confirmed by the judge.[169]

(1) *Conditions of the offer.* (a) The offer may be either before or after the Court has entered a formal order of adjudication; (b) the bankrupt must have filed a schedule of his debt and a list of his creditors; (c) must also have been examined in open Court concerning his assets; and (d) must have deposited the consideration to carry out the composition and enough besides to pay all the prior claims and costs of the administration.

(2) *Conditions of the Acceptance.* The acceptance must be (a) by a majority of the creditors both in amount and number whose claims are allowed, and (b) must be accepted by them in writing.

(3) *Conditions of the Confirmation.* (a) Confirmation must be by the judge (or referee), (b) when he

168. An assignee of several claims is one creditor, In re Messengil, 113 Fed. 366.

169. An acceptance cannot be withdrawn, In re Levy, 110 Fed. 744.

finds all the conditions complied with; (c) if the judge is satisfied that the composition offered is to the best interests of the creditors; (d) if the bankrupt has not been guilty of anything that would prevent his discharge in bankruptcy, and (e) if the offer and acceptance of the composition appears to be regular and in good faith.[170]

Sec. 83. WHEN COMPOSITIONS SET ASIDE. A composition may be set aside any time within six months after being confirmed upon the application of any one in interest where it appears that fraud was practiced in securing the composition and the applicant did not then know of the fraud.

Compositions may be offered to secure a secret advantage to the bankrupt; or they may be the result of fraud between the bankrupt and certain of the creditors. This might appear upon the proceedings for a confirmation. In that case of course a confirmation would be refused. If, however, the confirmation goes through it may still be set aside as stated above.

H. Set-Offs.

Sec. 84. RIGHT TO SET-OFF. Creditor may set off claim of bankrupt against his claim against the estate.

The law provides:

"Sec. 68. SET-OFFS AND COUNTERCLAIMS.—(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

170. There must be good faith both on part of debtor and creditor.

"(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

The set off of mutual debts and credits gives the creditor against whom a bankrupt has a claim an advantage. "A set-off may be described as a sort of a lawful preference."[171]

Held, under this section, a bank may set off deposit against notes due from depositor.[172]

Set-offs to be allowed must be *mutual.*

171. In re Pottier & Stymus Co., 262 Fed. 955.
172. In re Cross, 272 Fed. 39.

CHAPTER 8.

DUTIES AND RIGHTS OF BANKRUPT.

Sec. 85. DUTIES ENUMERATED BY ACT. The bankrupt must perform the duties enumerated by the Act, looking to the result of getting in the assets of the estate, securing proper and orderly administration, etc.

The Act provides:[173]

Sec. 7. DUTIES OF BANKRUPTS.—(a) The bankrupt shall

(1) Attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) Comply with all lawful orders of the court;

(3) Examine the correctness of all proofs of claims filed against his estate;

(4) Execute and deliver such papers as shall be ordered by the court;

(5) Execute to his trustee transfers of all his property in foreign countries;

(6) Immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) In case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) Prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the

173. Bankr. Act 1898, Sec. 7.

petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) When present at the first meeting of his creditors, and at such other time as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Sec. 86. DUTY TO SUBMIT TO EXAMINATIONS. The bankrupt must submit to examinations concerning his assets.

The bankrupt must "when present at the first meeting of his creditors, and at such other times as the

Court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate."

The right of examination under this section is very broad.[174] "It is the duty of the bankruptcy court to see that such examinations are not permitted to transcend the limit of a legitimate investigation for these purposes; but of necessity this is a duty which involves the exercise of a wide discretion and which should not be interfered with by the appellate court except where it has been manifestly abused."[175]

Witnesses may be called in these examinations of the bankrupt and the latitude allowed in their examination is as broad as that allowed in examining the bankrupt.[176] A refusal by such witnesses unless justifiable for some reason is contumacious and makes them subject to fine for contempt of court.[177]

We have seen the latitude allowed in the examination of a bankrupt. But the bankrupt still has his privilege against self incrimination.

To give a right to compel answers from him the act provided that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." This provision did not have the effect of accomplishing the purpose meant for it because the Court held that though such evidence might not be used against him yet because of what it might suggest or lead

174. In re Horgan, 98 Fed. 414.

175. Id.

176. In re Lathrop, Haskins & Co. 184 Fed. 934; Ulmer v. U. S. 219 Fed. 641.

177. In re Lathrop, Haskins & Co. *supra.*

to it might tend to incriminate him.[178] And therefore, a bankrupt may still refuse answers of this sort. Yet in an indirect way the result of compelling him to testify in answer to such questions has been accomplished, that is, by refusing him his discharge, where he refuses to answer any material question approved by the Court. If he refuses to answer questions on the ground that the answers might tend to incriminate him, he cannot be compelled to answer, yet he may be refused his discharge in bankruptcy.

Sec. 87. PROTECTION OF BANKRUPT FROM ARREST IN CIVIL CASES. The Bankruptcy Act protects a bankrupt from arrest or detention except upon claims which are not released by a discharge, and even in such cases he shall not be arrested while in attendance upon the court of bankruptcy or engaged in the duties imposed by the bankruptcy law.

While imprisonment for debt is generally abolished, yet civil arrest is still possible under the various state laws in tort cases. Whenever any claim upon which arrest may be had is dischargeable in bankruptcy, bankruptcy proceedings give one protection against arrest and detention.[179]

For offenses committed against the Court of Bankruptcy, the bankrupt may be arrested.

178. In re Kanter & Cohen, 117 Fed. 356. The court said: "In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which cannot possibly injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he cannot furnish without accusing himself and where it is not perfectly evident and manifest that the evidence called for will not be incriminating, the privilege must be allowed."

179. In re Dresser, 124 Fed. 915; In re Lewensohn, 99 Fed. 73.

Sec. 88. DETENTION OF THE BANKRUPT. Upon satisfactory proof, as provided in the bankruptcy law, that a bankrupt is about to leave the jurisdiction and thereby hinder the proceedings in bankruptcy, the court may order the marshal to detain the bankrupt.

The law provides for the detention of the bankrupt where proof is offered, on the affidavit of at least two persons, that he is about to leave the jurisdiction, and the Court finds that the allegations are true and that his going would hinder the bankruptcy proceedings.

Sec. 89. OFFENSES OF BANKRUPT CREATED BY THE BANKRUPTCY LAW. The bankruptcy law creates offenses and provides for their punishment.

In order to more surely secure observance of the provisions of the bankruptcy act by the bankrupt and others, the law creates offenses and provides for their punishment. They are as follows:[180]

(1) Concealment by the bankrupt of his assets—punishment, imprisonment not to exceed two years.

(2) Making of false oaths or accounts—punishment, same as above.

(3) Extorting money as a consideration for acting or refusing to act in bankruptcy—same punishment.

Besides these offenses, a bankrupt may be guilty of the offense of contempt of Court, for refusing to obey the lawful orders of the Court.

Sec. 90. THE BANKRUPT'S EXEMPTIONS. "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time

180. Bankr. Act, 1898 Sec. 21.

of the filing of the petition in the state wherein they have their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." [181]

(1) Bankrupt entitled to exemptions.

A bankrupt is entitled to the exemptions allowed by the law of the state in which he lives. This, of course, means that a bankrupt in one state, in claiming the exemptions of that state, may have greater or less exemptions than a bankrupt having his domicile in another state. That this does not prevent the law from being a "uniform" law, as required by the Constitution, has been discussed elsewhere.[182]

(2) Must specifically claim exemptions.

The bankrupt, to entitle himself to his exemptions, must claim them. He must include the property claimed in his schedules and then claim it with sufficient detail to identify it. He cannot omit it from his schedules merely because he regards it as exempt.[183]

The Act provides:[184]

"The bankrupt shall * * * (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition, if a voluntary bankrupt, * * * a claim for such exemptions as he may be entitled to, all in triplicate * * *."

If he does not claim his exemptions as required by the law he loses his right to them.

181. Id. Sec. 6.
182. See Sec. 4, *supra*.
183. In re Royal 112 Fed. 135.
184. Sec. 7 (8).

(3) Right to exemptions depends on law of the state.

Whether the bankrupt is entitled to exemptions and to what exemptions is determined entirely by the law of the state at the time of filing the petition.[185]

Exemptions are chiefly of three sorts: in personal property, in real property (homestead) and in earnings. Under some laws specific sorts of property are exempt (as working tools, etc.) without regard to value, while in others the debtor has a right to select a certain amount of property up to a certain value.

The bankrupt is not entitled to exemptions unless under the law of the state he would be so entitled when the petition was filed. Thus in one case[186] it was held that under the laws of the state of Colorado a debtor is not entitled to a homestead as exempt unless he enters his claim on the margin of the record title to the property. If, therefore, prior to the filing of the petition this had not been done, the bankrupt was not entitled to such exemption.

(4) Conversion of non-exempt property into exempt property prior to bankruptcy.

A debtor may convert non-exempt property into exempt property at any time and creditors although existing at that time, cannot object. Thus if a debtor has $1,000 cash, and the law allows him a homestead as exempt, he may after incurring debts and even when insolvent (but not yet bankrupt) put the non-exempt money into the exempt homestead and thus deprive his creditors of resort thereto, and prevent the trustee in bankruptcy from taking title thereto.[187] While this is

185. Libby v. Beverly, (C. C. A. 5th Cir.) 263 Fed. 63.
186. Edgerton v. Taylor, (   ) 270 Fed. 48.
187. Crawford v. Sternberg, 220 Fed. 73.

the general rule, the bankrupt cannot be guilty of actual fraud upon his creditors. Thus it was held[188] that where a debtor instead of depositing funds from his business from day to day as had been his prior practice, put same in vault or retained same upon his person, until he accumulated $13,000, which he put into a homestead and moved his family therein one month before filing his petition, this was a deliberate attempt to defraud, and the exemption would not be allowed.

188. Kangas v. Robie, (C. C. A. 8th Cir.) 264 Fed. 92.

CHAPTER 9

DISCHARGE.

A. The Discharge of the Bankrupt.

Sec. 91. IMPORTANCE OF DISCHARGE. The bankrupt's discharge is granted him if applied for by him as required by the Act, and has the effect of releasing him from his dischargeable debts. His discharge may be denied him for the causes specified in the Act.

It is the bankrupt's discharge in bankruptcy that releases him from his indebtedness. Merely filing a petition in bankruptcy does not discharge him. He must apply for and get his discharge, and if he fails to get it, or is denied it, his creditors may hold him notwithstanding the bankruptcy proceedings.

Sec. 92. WITHIN WHAT TIME DISCHARGE MUST BE APPLIED FOR. A discharge must be applied for within twelve months from the time the adjudication is made. On good cause shown the time may be extended six months.

The bankrupt should be careful to apply for his discharge within the time specified in the law. Otherwise the proceedings will have accomplished him nothing.

Sec. 93. THE PETITION FOR DISCHARGE. The application for a discharge is made by way of petition. Notice must be given to creditors.

The bankrupt applies for his discharge upon Official Form No. 57. Section 14 of the Act, governs the appli-

cation for discharge. Section 58 provides that there shall be 30 days notice to creditors.

Sec. 94. FILING OBJECTIONS TO DISCHARGE. Any creditor may file objections to discharge.

A creditor who desires to object to the bankrupt's discharge must file objections. He must enter his appearance in writing by the discharge day and specify the grounds of discharge within ten days thereafter. If not specified within that time, the bankrupt is entitled to his discharge. If the objections are specified, they are heard and passed upon, and the discharge allowed or denied according to the outcome.

A trustee, or any party in interest, may object to a discharge.

Sec. 95. GROUNDS FOR REFUSING DISCHARGE. The bankruptcy law enumerates the causes that are ground for objections to discharge.

The grounds upon which a discharge may be refused are as follows:

(1) Commission of any offenses created by the bankruptcy law.

The offenses defined in the bankruptcy act have been set out in Section 89 of this book. The law (Sec. 14b) sets forth that a bankrupt shall be entitled to a discharge unless he has "committeed an offense punishable by imprisonment as herein provided" (or unless he has been guilty of the other conduct herein below considered).

(2) Concealment or destruction of books or failure to keep books of record with intent to conceal financial condition.

A bankrupt is not entitled to his discharge if he has "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained."

Mere failure to keep books is not enough to prevent discharge. The law specifically requires that there shall be an intention to conceal his financial condition. "The bankruptcy act of 1867, as does the English law, made the mere failure to keep books a ground for refusing a discharge, but the Bankruptcy Act of 1898 explicitly states that the omission must have been accompanied with the specific intent to conceal the true financial condition and hence the burden of proving this intent is on the objecting creditors."[189]

Many merchants are careless about keeping books, never expecting to fail in business, although the slipshod methods may be the reason for their financial downfall.[190]

But it has been held that if a man of experience refuses to keep books, the natural presumption is that he intended to conceal his financial condition.[191] But this presumption is rebuttable.[192] "The bookkeeping of the bankrupt (a country butcher) was of that primitive character which sometimes is found in country stores and which is employed for little else than to supplement the store keeper's memory as to which of his customers are his debtors and what are the amounts of their debts.'

189. In re Brown, 199 Fed. 356.
190. In re Blalock, 118 Fed. 659.
191. In re Alvord, 135 Fed. 236; In re Javanitz, 219 Fed. 876; In re Schuner, 228 Fed. 794.
192. Thompson v. Lamb, (C. C. A. 3rd Cir.) 263 Fed. 61.

In the case of In re Shriner[193] the court said:

"The objecting creditor carries the burden of establishing the unlawful intent. It is well settled both upon reason and authority, that when intent becomes an essential element in a judicial investigation the quest for its existence, is to be made by resorting to the same methods of proof as for any other fact. As it is a fact peculiarly, and so far as direct evidence goes exclusively within the knowledge and keeping of the party charged with the wrongful conduct, of necessity the court may resort to interferences for conceded or established facts, the probative value of which will depend largely upon the reason of the thing. It is customary for honest merchants, having a regard for the success of their business and their commercial credit, to make and keep some record—entries in books, or at least memoranda—showing the course of business. The form, manner, method of doing this depends largely upon the character, volume, etc., of the business; the accuracy of such records will depend largely upon the experience and intelligence of the person making them. So their absence or character may be accounted for by reference to the same conditions. The only facts disclosed by the record are that the bankrupt was, for three years, in one of the largest of our commercial centers, conducting the business of buying and selling merchandise: it does not appear that he was ignorant or illiterate; his business involved carrying a stock of at least $4000 and contracting an indebtedness of $7,500; he made deposits in bank and drew checks. * * There is a rule of reason—sound in morals as in law—that a man is presumed to intend the logical and inevitable results of his conduct. * * * Here the only explanation

193. 228 Fed. 794.

of the so-called 'failure' is the loss of 'several hundred dollars' in gambling. This is entirely insufficient to rebut the natural and logical inference which should be drawn from the bankrupt's failure to keep books."

(3) Obtaining money or property upon credit on false written statement.

A bankrupt will be denied his discharge if he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

To constitute this objection there must have been *both* a false statement in writing *and* the procuring of goods on the strength thereof, and the statement must be intentionally and materially false.[194]

Statements made to mercantile agencies are statements within the meaning of this provision, if relied upon by creditors.[195]

Any creditor may avail himself of this objection although personally not misled thereby.[196]

(4) Making fraudulent conveyance within four months prior to bankruptcy.

A bankrupt will be denied his discharge if he has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed or concealed any of his property, with intent to hinder or delay or defraud his creditors."

194. 268 Fed. 871; 262 Fed. 876.
195. In re Carton & Co. 148 Fed. 63.
196. Id., In re Harr, 143 Fed. 421.

This is another ground for refusing discharge. We have considered fraudulent conveyances elsewhere. A fraudulent conveyance is an act of bankruptcy; it is a transfer avoidable by the trustee; it is a ground for refusing discharge.

(5) In voluntary cases, a prior discharge in bankruptcy with six years.

This ground of discharge is to prevent debtors from continually coming before the court with petitions in bankruptcy. It is not a ground for refusing discharge in involuntary cases.

The time is counted as running from the date of the order allowing the discharge on the second application.[197]

(6) Refusing to obey any lawful order, or answer any material question approved by the court.

This ground of refusal has been elsewhere considered.[198]

B. Debts not dischargeable.

Sec. 96. In general.

Assuming that a discharge is granted to the bankrupt —what debts are discharged thereby? Are there any that are not discharged?

Sec. 97. GENERAL RULE. The general rule is that a provable debt is a dischargeable debt.

If a debt is provable, it is usually discharged whether actually proved or not. But this general rule has its exceptions.

197. In re Little, 137 Fed. 521.
198. See Sec. 86, *supra.*

Sec. 98. DEBTS NOT AFFECTED BY A DISCHARGE. **A discharge in bankruptcy releases the debtor from all provable debts, except (1) taxes, (2) liabilities for obtaining money under false pretenses, or for wilful and malicious injuries to person or property, or for alimony, or for maintenance or support of wife or child, or for seduction, or for criminal conversation, (3) those not duly scheduled where no notice to debtor, (4) those created by fraud, embezzlement, misappropriation and defalcation.**

Sec. 17 of the Bankruptcy Act enumerates the debts not dischargeable by a discharge in bankruptcy. Debts may be not dischargeable (a) because *not provable*, and (b) because they are excepted whether provable or not. Let us consider seriatim the different cases of debts not discharged.

(1) Debts not provable.

If a debt is not a provable debt, manifestly it ought not to be discharged by the bankruptcy proceeding. If a creditor cannot prove his claim against the estate, he ought not to be deprived of that claim by bankruptcy proceedings.

We have seen that the great class of claims not provable are those that are for unliquidated damages growing out of commission of tort not reduced to judgment when the petition is filed. If reduced to judgment prior to the petition it is dischargeable, as it then becomes a fixed liability,[199] unless the injury was wilful or malicious.[200] But if the tort is 'waived' and claim made in contract it is then provable and hence dischargeable.[201]

199. Ex parte Harrison (D. C. Mass.) 272 Fed. 543; In re Wilson (D. C. Md.) 269 Fed. 845.

200. See paragraph (4), this section.

201. See Sec. 68, *supra*.

(2) Taxes not dischargeable.

A claim by the sovereign or subordinate governing body for taxes is provable, and has priority as a provable claim, but if assets are insufficient to pay it, the discharge in bankruptcy does not discharge it.

The wording of the law is that debts that "are due as a tax levied by the United States, the State, county, district or municipality in which he (the debtor) resides."

Local assessments levied by a taxing body are taxes within the meaning of this provision, and not dischargeable.[202]

(3) Debts not dischargeable if they are "liabilities for obtaining property by false pretenses or false representations."

These liabilities are not discharged. It is the purpose of the law to assist honest debtors. An act of this sort might prevent the debtor from getting his discharge; but even if he obtains it, it will not bar this sort of liability. The fraud referred to here is positive fraud, or fraud in fact involving intentional wrong, not constructive fraud or fraud in law which may exist by reason of general rule of law without the imputation of bad faith or immorality.[203]

If the liability is reduced to judgment it does not change the rule that it is not dischargeable.[204]

Where a person obtains property by representing himself to be solvent, the liability thereby created is not dischargeable in bankruptcy.[205]

202. In re Ott (D. C. Ia.) 95 Fed. 274.
203. Henneguin v. Clews, 111 U. S. 76 (former law).
204. In re Haskel, 228 Fed. 819.
205. In re Kalk, 270 Fed. 627.

(4) Debts not dischargeable if they are "liabilities for wilful and malicious injuries to the person or property of another."

To come within this provision the injury must have been intentional, otherwise it is a dischargeable liability.[206] Thus it was held that where a debtor built a fire in the street and after he had left it supposedly extinguished and a small boy's clothes caught fire, and he was burned, there was no wilful or malicious injury and the liability (which had been reduced to judgment) was dischargeable.[207] And where a person illegally drove a car while intoxicated, and in so doing injured another, the liability was discharged, unless he wilfully or intentionally committed the injury.[208]

But if the injury is wilful or malicious there is no discharge, as, for example, a judgment for assault and battery.[209]

(5) Debts not dischargeable if they are liabilities for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.

Public policy forbids that a debtor should obtain a discharge for liabilities of this sort.

Alimony is not in the nature of a debt and is neither provable or dischargeable. It is not affected by bankruptcy proceedings.[210]

206. Tinker v. Colwel, 193 U. S. 473; McClellan v. Schmidt, 235 Fed. 986.

207. McClellan v. Schmidt, *supra*.

208. Ex parte Harrison, (D. C. Mass.) 272 Fed. 543.

209. McChristal v. Clisbee, 190 Mass. 120.

210. Welty v. Welty, 195 Ill. 335; Audobon v. Schifeldt, 181 U. S. 575.

Money owing for maintenance of wife or child is of the same nature and not dischargeable.[211]

Liabilities for seduction and criminal conversation. The law on this point was in doubt until the amendment of 1903.

Liability arising out of breach of promise of marriage is dischargeable.[212]

If accompanied with seduction there is doubt.[213]

(6) Debts not dischargeable, if they have not been duly scheduled.

"Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

A debt is not discharged if the debtor does not schedule it, *unless* the creditor has notice of the proceedings. Precaution should be taken by the debtor to give correct name and address, although it has been held that the absence of street number does not prevent the claim from being duly scheduled.[214]

(7) Debts not dischargeable if "they were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

This language refers to those who are acting as public officers, or who are acting as trustees by reason of their office, and not to cases of implied trusts.[215] Any officer, whether the office is public, or private, who defaults

211. Blackstock v. Blackstock, 265 Fed. 549.
212. *In re* Fife, 109 Fed. 880; *In re* Komar, 234 Fed. 378.
213. *In re* Komar, *supra,*
214. Kreitlein v. Ferger, 238 U. S. 31.
215. Crawford v. Burke, 195 U. S. 176.

with funds held by him in his official capacity thereby creates a debt that is not discharged.[216]

Crawford v. Burke, decided under the former law, held that the word 'fiduciary' was meant to refer to express trusts not to trusts by implication and therefore would not refer to a misappropriation by a broker or other agent of money in his possession belonging to his principal (although any defalcation by an *officer*, public or private, would not be dischargeable whether the trust were express or implied.) But it has been held that such a misappropriation by a person who is not an express trustee is not dischargeable because it is a wilful or malicious injury and our Suprene Court has suggested that this clause as to wilful or malicious injury may have been put in to overcome Crawford v. Burke.[217]

Sec. 99. NEW PROMISE TO PAY. If the bankrupt after the petition in bankruptcy makes a new promise to pay the debt, this promise revives the debt.

A new promise to pay a debt discharged or dischargeable in bankruptcy raises a new obligation to pay it. In some but not all the states such new promise must be in writing. In any case it must be a definite promise, not a mere admission that the debt once existed.

216. Bloemecke v. Applegate, (C. C. A. 3rd Cir.) 271 Fed. 595.
217. McIntyre v. Kavanaugh, 242 U. S. 138; see also Baker v. Bryant Fertilizer Co. (C. C. A. 4th Cir.) 271 Fed. 473.

CHAPTER 10[218]

GENERAL LAW OF DEBTOR AND CREDITOR.

Sec. 100. INDEBTEDNESS DEFINED. An indebtedness exists where a person is under a present legal obligation to pay at a present or future time to another person a sum of money. The first person we call a debtor; the second, a creditor.

We are concerned in this and the next chapter with the legal rights in general of debtors and creditors. A person is "in debt" when he owes money, whether or not he is able to pay. One may have various sorts of legal obligations which in course of time either through performance or breach may develop into debts or obligations to pay money. Until one is under a *present* legal obligation *to pay money*, either at the present or some future time, he is not a debtor. Thus suppose that A contracts to build a house for B, for which B agrees to pay $5000. Neither in common nor technical parlance do we regard A as B's debtor or B as A's debtor. They are simply parties to an executory contract. A's obligation is to perform work; B's is to pay money *if* that work is done. A may break his contract and a judgment for damages be had against him. A is now B's debtor because *now* he owes B money.

218. Being one of two added chapters on the general subject of Debtor and Creditor. In these two chapters, subjects are not discussed which more logically are elsewhere in this series unless obviously necessary to be noticed here for purposes of continuity, etc.

So B becomes A's debtor if A instead of breaking his contract, performs it. B then owes A, $5000.

Sec. 101. DEBTS MATURE AND IMMATURE. While a debt is a present obligation to pay money, that obligation may be either to pay now or at a future time.

We have already indicated that one is a debtor if he owes money whether due or yet to fall due. It is enough that the money be owing. Thus when A builds B's house, B owes A $5000. But the terms of the contract may call for payment one year after the house is done. During that year B is A's debtor. Or, again, A applies to the bank for a sixty day loan. During this sixty days A is the bank's debtor. And so our National Bankruptcy Law speaks of debts owing but not due. There must be a sum of money which is owing and due or bound to become due. If that is true we have what we call a debt.

Sec. 102. DEBTS LIQUIDATED AND UNLIQUIDATED. A debt is liquidated when its amount is certain and not open to bona fide dispute. Otherwise it is called unliquidated.

If one may be said to owe money, yet it is impossible for either side to state the amount thereof correctly, and that amount cannot be arrived at by mere computation or calculation, but must be arrived at by an agreement between the parties, or the finding of a court, or the verdict of a jury, it is unliquidated. If it is a certain sum owing which cannot in good faith be disputed, then the indebtedness is spoken of as being liquidated.

Sec. 103. INDEBTEDNESS GROWING OUT OF BREACH OF CONTRACT OR COMMISSION OF TORT. **Indebtedness may grow out of the commission of a tort or the breach of contract. In such case it is unliquidated, until it has been rendered definite by agreement or judgment.**

Indebtedness arises usually out of a contract which then or through its operation creates an indebtedness. But indebtedness arises also out of breach of contract or the commission of a tort. For practical purposes, we must usually eliminate these classes of indebtedness; certainly those growing out of tort, until they have been reduced to judgment or some agreement has been entered into reducing them to certainty. Thus suppose that a person is injured through a defective sidewalk; he may or may not sue the city. If he does so it is often problematical whether he will recover, and it is certainly problematical what the amount of the verdict will be. But when a judgment is secured against the city, then we must place this liability among its indebtedness just as much as an indebtedness upon one of its bonds. The same is to an extent true in regard to the unliquidated liability for breach of contract. Thus the A house contracts to deliver goods to the B house. It fails to do so whereby the B house loses a profit. Yet the B house may never sue.

Sec. 104. SECURED AND UNSECURED INDEBTEDNESS. **Indebtedness is said to be secured when some property of the debtor has been appropriated by agreement to the debt so that the debtor's right to such property becomes subject to the payment of the debt.**

A secured indebtedness is one in which the debtor and creditor have by agreement either at the inception

of the debt or some time thereafter, appropriated to it certain property, so that if the debtor fails, the creditor may realize his debt out of the property. In order to accomplish this result, there must be such an appropriation of the property to the debt that the debtor cannot sell it or encumber it, except subject to this debt, or affect its value as security by his bankruptcy. There must be more than a mere agreement between debtor and creditor in respect to certain property; there must be also the added element of *notice* to third persons. This notice may be accomplished in two well-known ways, either by *taking possession* or by *recording*.

There are three principal sorts of secured indebtedness: pledges;[219] chattel mortgages;[220] and real estate mortgages.[221]

These three forms of secured indebtedness we will notice more at length. We may here make a few general remarks concerning secured indebtedness.

In the first place, the creditor is not confined to his security. He may sue and have judgment. Thus one owning a note secured by real estate mortgage could either foreclose or sue on the note.

Again, the creditor is not limited to the worth of the security. If it fails to bring the amount of the debt he still has his right to sue for the balance. In the same way if it brings more than the debt he must return the balance after reimbursing himself for his necessary expenses.

Again, the security has no existence as such apart from the debt. When the debt fails the right to the security fails.

For another thing, future attempted sales, encum-

219. See Sec. 109, in this chapter.
220. See Sec. 107, in this chapter.
221. See Subject of Property in this series.

brances, etc., cannot affect the creditor provided he has taken the proper possession of the property or had the transaction duly recorded.

Again, bankruptcy cannot affect the creditor's right to his security. Perhaps the chief purpose of taking security is to guard against the possible insolvency or bankruptcy of the debtor.

An unsecured debt is one in which the creditor has not taken the precaution of requiring the protection described. The great majority of mercantile accounts are unsecured. It is not practicable in such cases to take security. In the sale of a $5000 printing press, a security may be required—probably a mortgage of the press itself; so, in the sale of a soda water fountain, chairs for a hall, or any equipment. But in open accounts between merchants in the regular way of trade, the buyer's general reputation is relied upon. Upon his standing in the community depends his ability to get credit.

Sec. 105. GENERAL CREDITORS AND JUDGMENT, ATTACHMENT AND EXECUTION CREDITORS. A general creditor is one who has not made use of any process of the law whereby he may seize the property of his debtor in satisfaction of his debt. If one secures a judgment, brings attachment proceedings or takes out execution upon judgment he is known as a judgment, attachment or execution creditor.

The term "general creditor" is variously employed. It is most frequently used to indicate that the creditor has no judgment or lien or other legal process. But it is used at times to distinguish creditors who have no security from those who have security. It is also used to distinguish creditors from those who have priority.

After a debt arises it may of course be collected by

legal process provided there are assets out of which its amount may be made. If suit is brought and is successfully prosecuted it culminates in a judgment. The holder of the judgment is a judgment creditor. He now has a much higher grade of evidence than he ever had before, first, because it represents a trial, and therefore stands as an expression of the law upon the merits of his case, and secondly, because it is the basis for legal process. Appeal from the trial court to reverse the judgment may be taken provided it is taken within a certain time. Except upon such an appeal the judgment cannot be questioned, for the time for discussing the merits of the case has gone by with the trial.

A judgment usually gives a certain lien upon the judgment debtor's property. The extent and duration of that lien depends upon local statutes. As an example a judgment of the Circuit Court of the State of Illinois constitutes a lien upon the real estate of the debtor for one year. If execution is taken out the lien is extended.

A judgment in itself, though it may give a lien, will not otherwise result in bringing about a collection except it is voluntarily paid by the debtor. The creditor must now go about to *enforce* his judgment. He sues out the *writ of execution* upon his judgment. He is then known as an *execution creditor*. This gives him larger rights and more extensive liens. The sheriff may proceed by virtue of such execution to seize the property of the debtor. This is called a *levy*.

An *attaching creditor* is one who before judgment sues out the writ of attachment whereby, pending judgment, he holds the goods of the debtor.

Sec. 106. LIENS. A lien is a "hold" which a creditor has upon the property of his debtor.

One is said to have a lien when he has upon all, or certain items of the debtor's property a charge, so that

he may take or hold that property for his debt or subject to the payment of his debt. Liens are usually good against purchasers from the debtor, or future encumbrances and subsequent lienholders, but there may be liens which are merely good between the parties, and which because of lack of record, or change of possession would not be good against third parties.

Liens may be classified as follows:

1. Those arising by common law independent of contract (and statutory liens in the nature of common law liens). (Liens of bailees generally.)
2. Those arising out of contract (pledges, mortgage liens, etc.).
3. Statutory liens.
   (a) Those existing independent of judicial proceedings (mechanic's liens, etc.).
   (b) Those arising out of judicial proceedings (judgments liens, execution liens, attachment liens.).

A creditor has no lien from the mere fact that he is a creditor. He must have take n one by contract, or be the type of creditor to whom the general law gives a lien, or have acquired the lien that arises out of legal process.

A. Liens arising out of contract.

Sec. 107. CHATTEL MORTGAGES. A chattel mortgage is a lien upon specified personal property in the form of a conveyance of property with a condition or proviso that it shall be void if the debt is paid for which it is given as security.

(1) Form of chattel mortgage.

A chattel mortgage is in form a conveyance of the legal title to the property subject to a condition subsequent the performance of which renders the title de-

feasible. But in effect and for practical purposes the mortgagor remains the owner and the mortgagee has a lien which he may enforce according to the contract and the statute governing it.

(2) Subject matter of chattel mortgage.

The subject matter may be tangible, or intangible, although it is generally personal property of a tangible nature.[222]

Crops may be mortgaged as chattels—whether mature or immature, severed or unsevered.[223]

Fixtures may be mortgaged as chattels.[224] Thus A sells a machine to B, which B affixes in a permanent way to the realty. A takes back a chattel mortgage on his machine and properly preserves his rights by due recordation. B then mortgages the land to C. Ordinarily this would operate to give C a lien on the machine as part of the real estate. He must in this case, however, take subject to the prior chattel mortgage to A.[225] There is a difference of opinion whether one can attach chattels after the real estate mortgage, and by a chattel mortgage, keep them exempt from the operation of the real estate mortgage. The prevailing rule is that this can be done, unless the prior mortgage has in its terms included all fixtures and improvements to be placed thereupon.

If by annexation with the land the chattels are incorporated therein so as to lose their identity, as

222. Metro. Nat. Bk. v. St. L. D. Co. 36 Fed. 722 (good will of a business if in connection with the business).

223. Demers v. Graham, 36 Mont. 402.

224. Hughes v. Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2.

225. Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279.

bricks or lumber in a house, they cannot be the subject of a chattel mortgage.

In many states one cannot make a valid mortgage of a stock in trade which is to remain in the possession of the mortgagor with power to sell the same and deal with it as his own, at least unless he does it merely as the agent of the mortgagee, applying the proceeds to the payment of the debt or setting them aside as the proceeds of the mortgagee.[226]

(3) The debt secured.

One whose debt is unsecured or insufficiently secured may prevail upon the debtor to execute a chattel mortgage to secure, or more adequately secure the debt. But this may amount to a preference or an act of bankruptcy.[227]

The usual case in which a mortgage is given is one which is made to secure an indebtedness which arises at the time the mortgage is made as a part of the same transaction. It may be to secure a loan of money, or to secure a portion of a purchase price of an article bought and partially paid for.

One may make a mortgage to cover future advances. If the amount of the advances to be made appear in the mortgage, the party advancing such money may have priority over subsequent mortgages.

(4) Provisions of the mortgage.

Allusion to the usual form of a chattel mortgage shows that it is customary to name the parties, as

226. Hangen v. Hachemeister, 5 L. R. A. (N. Y.) 137; Zartman v. Bank, 189 N. Y. 267.
227. See Sec. —, *supra.*

mortgagor and mortgagee, at the beginning of the instrument. If a party to a mortgage is a corporation, the name of the corporation should be stated and not the name or names of any of its members or officers. If a party is a partnership, there are two ways of describing it in a chattel mortgage, thus "A., B., C. D. and E. F., copartners, trading as the General Manufacturing Company," or "The General Manufacturing Co." If the partnership is composed of only two or three members, perhaps all the partners should be named, as in the first case, but if it is composed of numerous members the second description would be of less trouble. (In a real estate mortgage, the only proper description would be the first one, that is, it should appear as executed by all the partners, as partners, trading as, etc.)

Real estate may be so described that the description, as made, can not pertain to any other land than the land in question; but the description of property in a chattel mortgage is more difficult. Suppose a number of chairs, for instance, are to be mortgaged. As between the parties it would not be difficult to tell what chairs are meant. But suppose the rights of third parties enter. The purpose of a mortgage is, as we know, to give notice to third persons. It follows that the description must be such that third persons may be notified from it, that the property against which thay are now seeking to establish rights, was the property mortgaged. If there are any identification marks, these should be given, as, for instance, the peculiar marking on an animal or serial numbers on machinery. And it may be noted that animals are comparatively easy of identification, as weight, size, name and peculiar markings can be given. In inanimate chattels, the make thereof, and principally, their location, serves to identify them.

It is customary to make notes in connection with

a mortgage which secures a loan. The debt should be described and the notes should be referred to. Reference to the ordinary form of mortgage will show how this reference and description should be made.

The "security clause" or "danger clause" is set out in the ordinary form of printed mortgage. It is almost always included. The extent of the rights thereunder is discussed later.

Just as in a deed, the grantor signs a chattel mortgage. Some states require *attestation*. This is not required in other states. Local statutes must be consulted.

The notes given to evidence the debt which the mortgage secures should state on their face that they are chattel mortgage notes. To omit this in many states is very serious and renders the mortgage of no effect.

(5) Perfecting the lien in respect to third persons.

A chattel mortgage is good as between the parties, whenever the contract has been made, though informal, and the court will enforce it; but the mortgagee is concerned that it shall also be good as against every one else who may claim a subsequent title or subsequent liens. He desires to feel secure against A, who may get a judgment against the mortgagor and claim a lien thereby on the mortgagor's goods; and against B to whom the mortgagor, violating his trust, may execute another mortgage upon the same property; and against C, to whom the mortgagor in violation of his trust may sell the mortgaged property.

How may he know when he has taken a mortgage that he is really secure, not only against the mortgagor, but against everyone else who has not already acquired rights? There may be said to be two ways of bringing

this about—by giving actual notice, and by doing those things which in the law may be said to amount to notice or as it is said, to constitute constructive notice. Actual notice exists in cases in which the third party in question had actual knowledge of the mortgage; constructive notice exists when the third party in question is from the circumstances *deemed to know* (whether he does or not), that is, the circumstances are such that he should have made inquiry and should have learned by proper investigation. We will consider the two chief cases in which constructive notice is given; first, where the proper record is made upon the public books; and, second, where possession is taken by the mortgagor.

Attestation, acknowledgment, recording, are not necessary as between the parties; neither are they necessary as against a third party where the third party in question had actual knowledge; neither are they necessary where notice is constructively given by some other fact, as by the taking or retaining of possession by the mortgagee. But otherwise the mortgagor must go before some proper officer and acknowledge the mortgage.

Also the mortgage must be recorded with the officer who is recorder of deeds in the jurisdiction where the mortgagor resides, or else in the jurisdiction where the goods are located.

Attestation is not so common a provision. In a few states it is provided for, but not in most.

Affidavits of good faith are also required by the laws of some states.

It is impossible to attempt here a statement of the requirements of the various jurisdictions.

In the majority of cases, the mortgagor retains his possession of the goods and uses them, and the mortgagee relies upon his compliance with the law as to

acknowledgement, recording, etc., to give him protection. If, however, the mortgagee takes possession, parties claiming rights, accruing thereafter, must claim them subject to the mortgage, for by the mortgagee's possession they are put on notice of the rights he has therein. Possession, then, constitutes a constructive notice in most, if not all, of the states, which is equivalent to the notice imparted by the record.

(6) Rights of possession under the mortgage.

Almost all mortgages provide that possession may remain with the mortgagor. Even where the mortgage did not so provide, and yet it was so understood, the mortgagor would be entitled to possession. But in the absence of any agreement the mortgagee would have the right to possession.

The insecurity of danger clause in a mortgage is a provision that the mortgagee in a mortgage which gives the mortgagor the right of possession shall have the right to enter and take possession if he deems himself insecure. In most states, he must proceed upon reasonable grounds. It is not necessary that he be actually in danger, but he must have reasonable grounds to fear that he is; [228] but in other states the rule is laid down that the reasonableness of his fear is not subject to inquiry.

(7) Foreclosure.

Foreclosure of a chattel mortgage may be accomplished in two ways: first, by filing a bill for foreclosure in the courts, and, second, by proceeding under a power of sale in the mortgage. Most mortgages provide

228. Hogan v. Aikin, 181 Ill. 448; See collection of authorities 19 L. R. A. (N. S.) 915.

that in case of default the mortgagee shall have the right to take possession of the mortgaged goods and sell them at public or private sale for the realization of the debt. This constitutes the "power of sale." In such a case the mortgagee may either proceed under the power or file his bill in the Court of Equity.

The sale may be public or private if the mortgage so provide, yet it should be made publicly upon public notice in order that the mortgagee may be fully protected against any claim that he has not used good faith or secured as much as the property would bring.

The mortgagee cannot purchase at his own sale, without the full and free consent of the mortgagor.

When the property upon sale does not bring the full amount of the debt with the proper costs of conducting it, the mortgagor is still indebted for the balance. Where the sale results in more than the debt, the surplus belongs to the mortgagor.

The mortgagor is not restricted to foreclosure; he may sue upon the indebtedness, and have judgment, and he may pursue his various methods concurrently. He cannot, however, have more than complete satisfaction of his debt.

Sec. 108. CONDITIONAL SALES. The term "conditional sale," is used to describe a transaction in which a seller of goods parts with their possession to the buyer, but in his contract reserves title for purposes of security.

A conditional sale is not technically a lien but a reservation of title. But it is for practical purposes a lien, the buyer being in a position of an owner, subject to the risk of loss, etc.

We are not here concerned with the conditional sale except to notice its operation as a lien or in the nature of a lien. As between the parties the contract

governs. If the title is not to pass until a condition is performed, e.g., the payment of the purchase price, it will not pass and the property can be recovered by replevin or in the manner provided by the contract.

Where one has a right to regain the goods by reason of his reservation of title, his conduct may show that he waived his rights, as by bringing suit for the price, etc.

It was announced in most of the earlier cases that a conditional sale was a transaction whose provisions were good against third parties, and a seller could assert his title against those who had dealt with the purchaser under the belief that he was the owner of the goods, either becoming purchasers or creditors. But because this rule operated very harshly on purchasers and creditors legislatures have passed recording laws in most states in which it is provided that the reservation of title will not be effective against purchasers of such goods from the purchaser in the conditional sale, or effective against creditors of such conditional purchaser, unless certain formalities are complied with, as having them in writing, executing them in a certain way and recording them, or unless the party involved had actual notice of the sale.

Statutes of this sort do not apply to the rights of the parties themselves and the seller may assert his reserved title against the conditional purchaser, though he may not have taken the precautions of proper registration. Neither does it apply where a third party concerned had actual notice, nor where the seller has not parted with possession to the purchaser.

Sec. 109. PLEDGES. A pledge is a deposit by a borrower of personal property with the lender in security for the debt.

One pledges property when he deposits it with another to secure the payment of a debt or the performance

of any obligation. The term pawn is also used to signify the transaction especially where tangible property is subject of the transfer and the lender is in the business of loaning money on chattels which he takes in his possession. Such a lender is known as a pawnbroker.

The term pledge is thus used to describe both highly important and petty transactions in the commercial world. If one deposits a trust deed or certificate of stock with a banker in security for a loan, the transaction is a pledge; if he borrows money from a friend and gives his watch as security, the transaction is a pledge; if he deposits the watch with a pawnbroker to secure a loan, the transaction is a pledge.

The term pledge is also used to describe the thing pledged.

The phrase "collateral security" is also used to indicate a pledge, especially where the thing pledged is intangible property.

A pledge differs from a chattel mortgage very materially. The form of transfer is entirely different; title does not pass even in form and in a pledge, the property is always with the lender, while in a chattel mortgage, as we have seen, the title is with either, according to the contract. Pledges are not placed of record as are chattel mortgages, for the lender's possession of the thing pledged protects him.

The party who owns the property and who deposits it with the other is called the pledgor. The party to whom the pledge is made is called the pledgee.

Any form or sort of personal property may be pledged. Thus one may pledge his watch, his bonds, his mortgages, his certificates of stock. Where intangible property is pledged, it is accomplished by means of an assignment, to which we will devote a separate chapter.

A pledge need not be in writing and the contract may be very informal. Thus A asks his friend to loan him $10 and hands him his watch as security. This is a pledge. The transaction in such a case is very simple.

In the case of a pledge of property which is represented by a document of title the pledge may be by transfer of the document.

We know from the law of sales of personal property that a sale may be accomplished by transferring the document of title, where there is one, that is, the bill of lading, the warehouse receipt, etc., the possession of which is necessary to obtain the goods or at least is evidence of the title to the goods. In the same way property may be pledged by transferring the document of title. Such document when transferred would not necessarily indicate whether the holder was pledgee or purchaser. Thus, the pledge of a warehouse receipt would probably simply hold the receipt endorsed in blank. As between the parties the nature of the transaction would be provable.

Delivery of possession either of the article itself, or of the document which represents the article (the article being with some third person, as a carrier, warehouseman, etc.) is absolutely necessary to constitute a pledge. Thus I cannot pledge my corn unless I deliver the corn to the pledgee; unless the corn is held by some third person and my title to it is evidenced by a bill of lading or receipt, in which case I can pledge by transferring the document of title.

Where a pledge is accomplished by a transfer of a document of title, or where the thing pledged is intangible property, like a note, bond, certificate of stock, etc., the question arises whether indorsement or written assignment is necessary. Provided possession is given,

endorsement or assignment to the pledgee is not strictly necessary though it is customary and is also highly convenient to the pledgee in enforcing his pledge. If for instance I hold an unendorsed note as pledgee I may have a right to realize upon it as pledgee if the pledgor defaults, but I might be greatly embarrassed without the endorsement and require the assistance of a court to protect me in my rights.

A pledgee is not confined to his remedy upon the pledge. He may bring suit upon the debt and in this way satisfy his claim. There is no obligation on his part to sell the property pledged. He may, however, and this perhaps is the usual case, find his recourse by a sale of the pledge. His express or implied contract is that he shall have the right to sell the pledge if the debt is unpaid at its maturity and apply the proceeds upon his debt. If the sale does not bring the amount of the debt the pledgor still owes the deficiency. If the sale brings more than the amount of the debt the pledgor is entitled to the surplus after the reasonable expenses incident to the sale are subtracted.

Where notes are pledged, the question arises whether the pledgee may sell the notes, or whether he only has the right to hold them until maturity and collect them. By the weight of authority he cannot sell them. Thus, if A makes a note to B, and B pledges this note with C for a loan, C's right is to collect the note and apply the amount collected on his debt. By special contract however he could sell the note. The same rule applies to bonds, and similar choses in action.[229]

The contract of the pledge may set forth the circumstances under which the sale is to take place. It

229. Peacock v. Phillips, 247 Ill. 468.

may, for instance, provide that the sale may be either public or private or that it may be with or without notice. But whatever the terms of the contract, the general law provides that the sale must be conducted in the utmost good faith. Therefore, a pledgee who has a right of private sale might nevertheless find it to his advantage to sell at public sale for the would thereby protect himself against an allegation of bad faith. The pledgee should give full notice of the sale so as to attract purchasers and obtain the highest price possible. The pledgee can not purchase at his own sale, unless the pledge specifically gives him that right.

Sec. 110. ASSIGNMENTS OF CONTRACTUAL RIGHTS BY WAY OF SECURITY. Contractual rights may be assigned by way of security.

(1) Power to assign.

We have already considered the pledge of property by use of the Document of Title representing the same. Now, we consider the assignment of rights under a contract not including those documents.

Assignment of contractual rights may be by way of sale, gift, or security. We think of it here as for the purpose of security.

A person has power to assign a contractual right without or even against the consent of the other party to the contract in cases where the assignment does not involve any transfer of credit, skill or other personal attribute, i. e., merely results in entitling the assignee to receive money or goods. Thus an employee, may, without his employer's consent, assign his salary in security for a loan and the employer must recognize such assignment.

(2) Assignment of expectancies and future interests.

It is decided that if one expects to inherit property he may assign his right to that property and usually where an expectancy may be said to be coupled with an interest it is assignable. With reference to contractual rights it is settled that rights of this sort cannot be assigned unless the contract has already been entered into. It is, however, unnecessary that the contract be definite as to its duration. Thus one may assign all his future wages which he is to earn under a present contract of employment even though that employment might without breach be terminated at any time.[230]

(3) Title of assignee.

One who acquires a right by assignment takes it in the same condition in which it exists in the hands of the assignor. Thus if B assigns to C his salary, alleged to be due from A and A has already paid the salary or does not owe it he can set up the defense as well against C as he could against B although C may have supposed he was getting a valid claim and may have given full value for it.

This, as we know, is not true in the case of that sort of transfer which we term negotiation. Rights are not negotiable unless drawn up in a particular way and contain certain essential elements; and they are then negotiable because the parties by putting them in that form thereby signify their intentions to make them negotiable. In such a case, transfer may cut off defenses and the transferee takes a better title than his transferor, but this is not true in respect to rights and instruments merely assignable.

230. Mallin v. Wenham, 209 Ill. 292.

(4) Notice to debtor.

Using our same illustration of an assignment by B to C of his right or claim against A we must notice that C cannot acquire full protection of his rights until he has notified A of the assignment. Thus if A owes B a salary and B in order to secure C for a loan made by C to B assigns C his salary, C must give A notice of the assignment, otherwise C runs the risk that A may pay the salary to B not knowing of the assignment. In the case of that sort of transfer termed negotiation, this is not true for from the fact that it is made to be negotiated, the debtor must take notice that it may have been negotiated and hence must not pay any money except to the party holding the instrument properly endorsed.

B. Liens Independent of Contract.

Sec. 111. THE COMMON LAW LIENS. The common law gave certain liens to a creditor independent of contract. Possession by the creditor was requisite. There may be also liens by statute which are of the same nature as common law liens and a mere extension thereof.

(1) In general.

In this division we will consider those liens which a creditor has upon the property of his debtor by the principles of the common law and which do not arise out of any contract, but exist under the general law. Statutes have also given liens of this sort which are in their nature similar to common law liens, and we will consider these liens as they exist under the common law and under the statutes. There are also certain statutory liens independent of contract which we will consider

later because they are essentially different from common law liens.

In the common law lien possession is an essential element and if the creditor parts with possession he loses his lien unless he reserves it by contract.

We should notice in the first place that unless a creditor acquires a lien by contract or by some judicial procedure he does not have, as a usual rule, any lien upon his debtor's property. Thus, if A loans money to B, taking no security, he does not by virtue of the loan have any lien on B's property. Or, if A sells goods to B and does not retain the goods until paid or enter into any contract for a lien, he has taken B's general credit and has no lien. Yet there are a few cases where the law for reasons of public policy gives a lien though none has been preserved by contract.

The cases where this is true are considered in the subsequent paragraphs.

(2) Liens of common carriers.

The common law gave a common carrier of goods a lien for his charges. This lien attaches only to the goods shipped under that contract and is lost by delivery of the goods to the consignee.

(3) Liens of warehousemen.

The common law gave a lien upon the goods stored for the proper warehouse charges. This lien extends only to the goods stored under the contract for which the charge is made and is lost by delivery of the goods.

(4) Liens of inn keeper.

An innkeeper, being obliged to receive whoever comes for entertainment, is given a lien by the common law

upon the property of the guest for all charges properly made for board and lodging and this lien has been extended in some respects by the statute.

(5) Lien of agister.

An agister is one who pastures cattle. By the common law he had no lien but some statutes give him a lien.

(6) Lien of livery stable keeper.

A livery stable keeper had no lien by the common law unless he cured or trained the animals within his keep, but statutes have given him a lien in some states.

(7) Lien of bailee spending money or services on goods.

An ordinary bailee usually had no lien for his charges but if under his contract he spent money or rendered services he acquired a lien.

(8) Lien of vendor.

One who sells goods upon a general credit has no lien upon them unless he has retained it by contract. He may, of course, take back a mortgage and protect himself by his contract. But if the sale was for cash, he is not obliged to part with the goods until they are paid for and has a lien which he may enforce. He loses this lien by delivery of the goods to the vendee. A vendor has more extensive rights than other lienors. See subject "Sales" in this series.

(9) Lien of landlord.

A landlord did not have any lien upon the goods of his tenant, that is to say, the tenant could sell and dis-

pose of those goods at pleasure until the landlord acquired some lien by judicial proceedings. In most of our states the landlord has no lien, but he may acquire one at any time by a judicial proceeding called distress proceedings.

(10) Common law lien is good against third persons.

Just as a chattel mortgage properly recorded or real estate mortgage and a pledge protect the creditor against all the world (as well as the debtor) so a common law lien enables one to hold the goods not only against the debtor but against all the rest of the world, that is to say against parties who may have purchased the goods or taken a mortgage or secured a judgment. The possession of the goods by the creditor is a notice to the world of the rights which he claims therein.

(11) Loss of lien.

Possession is an essential element in a common law lien; by voluntarily parting with the possession the lien is lost.

(12) Enforcement of lien.

By the common law the lien holder had no right of sale. He might sell if the goods were perishable, but not otherwise unless that was his special contract. But statutes have given right of sale, especially to warehousemen, innkeepers and the like.

(13) Lien is special, not general.

The lien attaches only to the property held under the bailment. It cannot be applied to property subse-

quently delivered to the bailee unless delivered under the same contract.

Sec. 112. THE STATUTORY MECHANIC'S LIEN. A mechanic's lien is a lien, arising independent of contract, by virtue of local statute giving materialmen, laborers and contractors a lien on real estate to whose permanent improvement they have contributed labor or material.

A mechanic's lien is a lien arising independently of contract and is given by the general laws of most of the states to those who furnish material or services for the improvement of real estate. In such a case there is of course no holding of possession by the claimant as is necessary in the case of common law liens which arise independently of contract. This lien arises when the material or services are furnished and is enforceable against the owner for a certain period and also against third persons for a period provided the claim is recorded or the suit started within a certain prescribed time.

While the statute of each state must be strictly construed in reference to the right to claim a mechanic's lien we may say that such laws usually provide for a lien by (1) materialman, and (2) by those who render services; provided the material is furnished and the services rendered for the *improvement of real estate*. Thus the contractor who builds the house, the lumberman who delivers the lumber, the mason who lays the brick, may all claim their lien.

Those who furnish material or services may be classified into contractors and subcontractors. A subcontractor has a shorter time, usually, in which to claim his mechanic's lien than a general contractor

has. The law provides that before a general contractor may claim his lien he shall, if demanded, furnish affidavits as provided by statute, showing who all subcontractors are.

A mechanic's lien has precedence over all mortgages, judgments or other liens arising subsequently provided the steps required by the statute are taken in apt time to perfect the lien.

It will be noticed that a person has a lien up to a certain time good against the world even though there is no public record of his claim for a lien. This is allowed to exist upon the theory that the doing of the work or the supplying of the material is in itself an act constituting notice to third parties in the same way that possession of property is held to constitute notice of the rights of the possessor which is equivalent to notice given by record.

The lien dates as of the time the contract was made.

We have noticed that one may perfect his lien by recording a claim for it, within a certain time. In order to perfect the lien he must file his claim within a certain time or start a suit within that time. Having perfected the lien within the proper time he may then enforce it by suit within a much longer period. Enforcement of the lien is accomplished by a suit which proceeds to trial and in which, if the issues be found in favor of the claimant, a decree is entered for the sale of the land, much in the same manner that land is sold to foreclose a mortgage.

Redemption of the land sold may be made by the owner within the same period that redemption under other judicial sales may be made.

C. Liens Acquired Through Judicial Proceedings.

Sec. 113. GENERAL STATEMENT — JUDICIAL LIENS. Liens may be acquired by a debtor by obtaining a judgment, or pursuing other legal process.

The judicial liens, i.e., liens arising through judgment on other judicial process are entirely statutory. Usually the mere obtaining of a judgment operates to give a lien upon the property of the debtor.

CHAPTER 11[231]

REMEDIES OF CREDITORS.

A. Remedies to Enforce Payment of Debt.

Sec. 114. THE REMEDY OF A SUIT AT LAW. A creditor may enforce his claim through the means of an ordinary suit at law pursued to judgment.

Where one has a claim against another it may or may not be such a claim as the law will allow to constitute a legal obligation, or it may be justly or unjustly made. In order to establish the legality and justness of a claim, courts are established in which the evidence on both sides is taken and a judgment entered accordingly. It is not until such judgment is obtained that one's claim becomes a matter of legal certainty or of record. When it has once been so obtained, then a judgment is on its face of legal value, the evidence upon which it is supported cannot, except upon appeal or in a few cases we need not notice at present, be again inquired into. By virtue of such a judgment the law provides machinery whereby under it a debtor's property may be taken to satisfy the debt.

The suit is first to be put at issue by the written pleadings, i.e., the plaintiff's statement of the case and the defendant's defense, if any.

If the defendant makes no defense he is defaulted.

After the issue is determined by the pleadings, the case proceeds to trial. It may be before the court with

231. Being the second of two added chapters on the general subject of Debtor & Creditor.

or without a jury. Either party is entitled to jury trial upon the questions of fact, but frequently both sides waive jury and submit the issues of fact to the judge. The jury's return is called a *verdict;* a judges finding of fact is called a *finding*. The *judgment* is based upon the verdict or finding and becomes the unimpeachable record of the rights of the parties, except that the defeated party may *appeal* to the upper court which passes merely upon the record to determine if the error was committed in the lower court.

Sec. 115. REMEDY OF BILL TO SET ASIDE A FRAUDULENT CONVEYANCE. A conveyance by a debtor whereby he hinders, delays or defeats his creditors in the collection of his indebtedness to them is called "fraudulent" and may be set aside by the creditors through the medium of a bill in equity.

(1) General statement.

We have seen that a creditor has no lien upon the property belonging to his debtor, unless he has secured the lien by contract, except in a few cases, until he has obtained such lien through legal proceedings. Consequently a debtor may freely sell his property, even though insolvent, provided he acts in good faith and gets value, and if not insolvent may dispose of his property by gift.

But it is a well settled principle of law that a debtor cannot dispose of his property if his purpose and the effect of the disposition is to "hinder, delay and defraud" his creditors.

It is at once apparent that in a conveyance alleged to be fraudulent, a complication arises in the fact that a third party, namely, the purchaser or taker is involved. It is, therefore, not enough to prove the debtor's pur-

pose; it must also be shown that the third party is chargeable with a knowledge of that purpose, or that he has parted with nothing in return for the property.

We will find that fraudulent conveyances may be grouped under two general heads: (1) Conveyances for value (or apparent value), and (2) voluntary conveyances. In a conveyance for value, the taker must be a party to or chargeable with notice of the fraudulent purpose or else he gets a perfect title. A voluntary conveyance is deemed to be fraudulent under circumstances we may note later; and in that case it may be set aside no matter how innocent the taker is, for, having given nothing, he may not complain against those who have been defrauded. We will find, therefore, that a fraudulent conveyance may be set aside unless the taker both gives value and has no notice. And one is deemed to have notice not only when he has *actual* notice, but also when the circumstances are such that it is the policy of the law to charge him with notice. We will find that a conveyance may be fraudulent in the eyes of the law though in fact the particular case has no taint of moral turpitude. For there are circumstances which would tend to encourage fraud if we allowed conveyances to be made under them, and therefore the courts will set these aside as fraudulent as a matter of law.

(2) History of law of fraudulent conveyances.

By the principles of the common law and by many statutes passed declaratory thereof, conveyances in fraud of creditors could be set aside.

An early English statute was passed on this subject known as the Statute of 13th Elizabeth, Chapter 5; and it declared for the punishment of parties who should

justify fraudulent conveyances as made in good faith and upon good consideration. This statute is one of the famous and important statutes in the history of English jurisprudence. It has in effect been copied in the American commonwealths.

Shortly after this statute was passed, a famous case was decided known as Twyne's Case,[232] in which it was held that a certain conveyance had signs or badges of fraud, in that the conveyance was general in its terms, and because the seller remained in possession of the goods and treated them as his own.

(3) Gifts as fraudulent conveyances.

It will be noticed that the language of the statute of fraudulent conveyances declares all conveyances fraudulent except such as are made *bona fide* and upon *good consideration*. It has been decided in innumerable cases that a gift, though in fact honestly made and innocently taken, may be set aside by creditors and its subject reached for satisfaction of debts, whenever it was made by one whose circumstances made such gift an improvident thing to do; in other words, when his creditors were thereby deprived of, or hindered and delayed in, the collection of their debts. A maxim, uttered by one of the judges, has become famous: "A man must be just before he is generous." Consequently the law classifies a gift as a fraudulent conveyance, though in the particular case, innocently made and taken, provided the giver was in such straits, financially, that he was or thereupon became practically insolvent. Thus suppose that A owes $10,000, now due. His assets are practically $5,000. He buys a lot of land and gives it to his son. The gift may be set aside by A's cred-

232. Twyne's Case, 3 Coke, 80.

itors. On the other hand if the gift is made by one while he is solvent, it cannot be attacked by his creditors. A while unquestionably solvent deeds his wife his property. Afterwards he contracts debts which he cannot pay. A's creditors cannot reach the property conveyed to Mrs. A. Yet one may make a voluntary conveyance fraudulent as to future creditors, as well as to existing creditors, as shown in the following paragraph.

Different rules have been formulated in reference to the rights of future creditors to set aside a gift. We have just seen that a person who is perfectly solvent may make gifts which are irrevocable by his creditors, though he have existing creditors, for by our hypothesis enough assets remain to pay all his debts. We have also seen that if he is insolvent his creditors can object. Must these creditors be creditors at that time? In some jurisdictions the future creditors need only show that there were existing creditors; but in other states the future creditors must show that ;the gift was made with actual intent to defraud *them*.

If one makes a conveyance as a gift or as a sale to another in order to defeat his creditors, he is perhaps more likely to make the conveyance to a member of his family. Most of the Courts will therefore look upon such conveyances with some suspicion when made by a debtor in failing circumstances, to see whether the conveyance, though expressed to be upon considerations, is voluntary; or to see if it is actually fraudulent though for value. Such circumstance then is a proper one with other circumstances to make out a case of fraud.

A gift is a conveyance, as we know, for which no

value is promised or given. When a conveyance is for value, it may still be set aside if the taker have actual knowledge, or constructive notice. We must now consider what is value.

(4) Conveyance for value as fraudulent.

(a) *In general.*

We have noted how a debtor even though he be insolvent may transfer a good title to his property to one who has given value and taken in good faith, and creditors of such a party cannot complain. Of course if such creditors have acquired liens on such property before it is transferred, the property will remain subject to such liens no matter through how many hands it passes. It shall be our purpose in this subdivision to inquire what constitutes value, and what constitutes good faith, or stated in another way, what constitutes notice to the purchaser of the fraud that is being practiced by the debtor. We may assume that the debtor by such conveyance is hindering, delaying or defeating his creditors, for otherwise they would have no right to complain. We shall notice that it is not necessary to charge the purchaser with actual knowledge, as there are many circumstances which constitute notice in the law, regardless of the actual good faith in the particular case. A purchaser is bound to know that if he purchases under circumstances that should arouse his suspicion, he is bound to investigate the seller's real intent and the effect of the conveyance. If a purchaser should have notice, he is taken to have notice, though in the particular case he purchased innocently and has given value. There are certain circumstances which in the law constitute fraud and there are other circumstances that constitute

evidences of fraud, and a purchaser must know the law and be governed accordingly.

As a purchaser to be protected in a fraudulent conveyance must (1) give value and (2) take in good faith or without notice, we shall inquire, first, what constitutes value and, second, what constitutes notice.

(b) *What constitutes value.*

We shall under the next subdivision in reference to notice, see that the inadequacy of the consideration may be so great as to show fraud and that the purchaser is a party thereto or chargeable therewith. Here we may simply notice that the inadequacy of the value does not keep it from being value. In other words, a purchaser may be protected as a purchaser for value even though he has not given the full market value of the thing purchased. Thus D, a debtor, in a scheme to defraud his creditors, sells to P, a piece of real estate. P by the price agreed upon gets an exceptionally good bargain; this in itself is not material. He is a purchaser for value and as such his purchase cannot be disturbed.

Clearly the purchase of property for money paid by the purchaser, or for tangible property parted with by him, is a purchase for value.

A sale may still be for value though the consideration consists in a promise in the shape of promissory notes, etc. If, however, the sale is to one on credit who is not fully financially responsible or the debt is not secured, the sale will not be upheld. And if unusual terms are given they will be considered as evidences of fraud between seller and purchaser.

While as between the parties themselves a conveyance of property in return for a promise to render future

services or support, may be upheld, yet clearly it would open the door to fraud to hold that conveyances of this sort will be upheld against creditors. Thus A, having certain property and being indebted, conveys all his property to B, in return for B's promise to support him the rest of his life. A's creditors can have this conveyance set aside. If B is no party to any fraud, and has actually furnished support, the conveyance will be upheld to the amount of the support he has thus actually given.

To pay or to secure an already existing indebtedness, one may make a conveyance and it will be upheld as a valid conveyance for the purpose of paying or securing the debt. Thus D is indebted to A, B and C. To C he conveys certain property to secure or to pay the debt. Although this amounts to preferring C over the other creditors yet it will stand, as a conveyance for value. Under the Federal Bankruptcy Law, however, it might be set aside, provided proceedings in bankruptcy were begun by the other creditors within four months from the time the conveyance was made, and provided also C knew or had reasonable cause to know that a preference was intended.

(c) *The participation in, or notice of the fraud, by the purchaser.*

Having now considered what may constitute value, and assuming that the property in question has not been conveyed as a gift, but that the purchaser has really or apparently given value, let us inquire what conduct or notice makes him a party to the fraud so that he will be prevented from setting up his title against the creditors who seek to set aside the conveyance. If he is an active party to the fraud in the

sense that he agrees to receive the property in order to defeat creditors and afterwards convey it back again, then our subject presents little difficulty. Such a purchaser is an actively guilty party and cannot crave the law's protection. If we want simply to charge him with knowledge or notice, we may consider that he may be charged with knowledge because he has (1) actual notice; or (2) constructive notice. Let us consider these two heads.

If the creditor knows that actual fraud is being attempted by the conveyance to him, then he is a party to a transaction which will not stand if attacked on that ground by the creditors. The difficulty in such a case would be to prove his knowledge. The presence of some of the "badges of fraud" we will consider hereafter might help in that respect.

A purchaser cannot be blind to the obvious meaning and effect of a conveyance. If the circumstances are such that he should be put on inquiry he must pursue the inquiry that a reasonably prudent man under the same circumstances would have made. Besides this, there are circumstances which in law constitute fraud, and in that case the purchaser would as a matter of law be a party to the fraudulent conveyance.

We may consider the following circumstances as to whether they will put a purchaser on inquiry.

(1) *Inadequate Consideration.* Inadequate consideration does not in itself put a purchaser on notice unless it is "gross," that is, a very substantial inadequacy, there being nothing to explain why it is so inadequate. But inadequacy of consideration, especially if very *great*, may be material as evidence in connection with other evidence of actual notice or connivance. Aside from these considerations, we have found that inade-

quate consideration is a sufficient consideration to support a purchase even against creditors.

(2) *Bulk Sale of All of Stock in Trade.* One can buy an entire stock in trade without danger of thereby becoming charged with notice of the seller's fraudulent intent (if any). But if the sale is made secretly, or hastily, and without proper inventories, or if there are any facts to arouse a prudent man's suspicion, the purchaser will be charged with notice. Besides, there are now in many states "Bulk Sales Acts" which make a bulk sale fraudulent as to creditors unless they are notified as the law directs.

(3) *Knowledge of Grantor's Insolvency.* This in itself is insufficient to constitute notice of fraud, for we know that an insolvent person may still sell his property, but we can readily see how this, as an element, might make a stronger case.

(4) *In General.* We see from these illustrations that it simply becomes a question in any case of applying the general rule that a purchaser is chargable with notice when the circumstances would constitute notice to a reasonably prudent man, the average buyer.

(d) *Badges of fraud.*

General statement. We have noted that the greatest difficulty in cases to set aside fraudulent conveyances, is to prove the case. The creditors might be able to prove circumstances that would put a purchaser on notice and thereby charge him with knowledge but it might be that the purchaser is believed to have had actual knowledge, and even to have been in connivance with the debtor. In such a case there may be what the law calls "badges of fraud," signs or labels which indicate the irregular and fraudulent nature of the

transaction. Ever since Statute 13th Elizabeth, Ch. 5, and Twyne's Case, there have been certain well known "badges of fraud," which we will now consider. These badges of fraud do not necessarily *prove* that there has been fraud; but they are evidences of fraud, or, constitute a *prima facie* case of fraud. In some cases, however, and in some jurisdictions, they constitute fraud itself, or, as it is said, "legal fraud", and there can be no rebuttal of the fraud so constituted or presumed.

Retention of possession by seller. It has long been the law that where personal property is sold under an absolute bill of sale, there must be an immediate and notorious change of possession. Retention by the vendor makes out a case of fraud. In some states, the case thus made out is only a *prima facie* one, subject to rebuttal by evidence that the sale was in fact honest. But in other Courts, the actual good faith in the transaction is immaterial.[234]

Change of possession need not consist in change of *location.* It is enough if the purchaser goes in charge, and assumes control in such a manner that any one interested could find that a change had taken place.

234. In the following states retention is considered as prima facie evidence of fraud, rebuttable by evidence that the sale was actually for value and in good faith; Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. In the following states retention of possession is conclusively presumed to be fraud: California, Colorado, Connecticut, Idaho, Illinois, Iowa (unless recorded), Kentucky, Maine, Maryland (unless recorded), Masachusetts, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Washington (unless recorded). In Mexico and Wyoming not clearly established.

Thus, if a store is sold, and the new owner goes into possession, assuming control, so that any one concerned would be put to inquire whether a change had not taken place, this would be a sufficient change of possession and the sale would be good against the seller's creditors.

A reasonable time is allowed for the change of possession.

If goods are ponderous or scattered and therefore immediate possession is difficult, these circumstances enter into the case and govern the reasonableness of the time for removal.

Inadequate consideration. Gross inadequacy of price is usually taken in connection with other circumstances to make out a badge of fraud. In itself it is not an evidence of fraud unless great enough to "shock the conscience." Even then it is not final proof of fraud. It may be shown that notwithstanding the gross inadequacy, the transaction was in fact honest.

Consideration fictitious in part: If all of a consideration expressed is fictitious the conveyance is void where a voluntary conveyance would be void, for it is voluntary. If part of the consideration is fictitious, this is a badge of fraud. Thus if one should convey property for a valid consideration, and another consideration wholly fictitious is recited, as a debt which never existed, this shows a fraudulent arrangement between the parties. The parties by such recital, that is, by their attempt to give the conveyance an appearance of fairness, are really creating evidence against themselves.

Sales of entire stock in trade in bulk are not improper and the fact that there is such a sale shows no fraud. Yet it is also true that fraud may easily be accomplished by such sales and if there is anything irregular

in the sale, as where made hurriedly, or for a bulk price without inventory, etc., all goes to show that the transaction was fraudulent.

In some states laws have been passed known as *bulk sales laws* requiring that one who sells his entire stock in trade in bulk, shall notify his creditors, or make a certain specified public notice, or both.

B. Payment and Tender.

Sec. 116. PAYMENT OF LIQUIDATED DEBT. Payment of a debt may be in any medium the parties agree, and may be absolute or conditional.

The parties may agree upon any medium—gold, silver, certificates, bank notes, etc., or check of the payer. When a debt is expressed to be payable in any medium, as, for instance "gold, of the present standard of weight and fineness" often found in mortgages and mortgage notes, the payment as a matter of fact is not usually in the medium expressed, the creditor having the right, of course, to waive his privileges in that respect.

Where payment is by bank check or other commercial paper, such payment is in most states considered only

235. Under a Bulk Sale Act, this sale would be void as to creditors. See further herein and note 236.

236. Bulk sales laws are in force in Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

a conditional payment and does not in itself discharge the original debt.

If D owes C $100 and gives him his check in payment upon the bank in which he thereby represents he has or will have a deposit, the check is only conditional payment. It is accepted upon the theory that it will be paid. If not paid, there may be a suit either upon the check or upon the original indebtedness. The same is true of any negotiable paper, whether it be the paper of the debtor or of some third person. It is true that such paper might be accepted as an absolute payment, but there is no presumption that it is so accepted. There would have to be a special agreement to that effect.[237]

Sec. 117. TENDER OF PAYMENT. A tender of payment of the correct amount when the debt is due, will not discharge the debt, for tender "must be kept good," but it will stop accruing interest, costs, damages, etc. But tender to have this effect must be in legal tender and in the right amount at the right place.

Where and when tender may be made in contracts so that it will operate as a discharge of such contracts is a subject for discussion under the general law of contracts. Usually, we may say, that where tender may be made, a tender will discharge the contract and such tender need not be kept good. But in a money obligation tender must be kept good, that is, a tender once made does not discharge the indebtedness. But

237. This is the rule in all states except, it seems, four: Indiana, Maine, Massachusetts and Vermont, in which states the presumption is that such paper is taken in absolute payment, subject to rebutting evidence. Combination, etc. Co. v. St. Paul City Railway, 47 Minn. 207.

a tender properly made at the proper time and place and in the proper amount will discharge accruing interest, costs, damages, etc.

Tender must be in "legal tender," but if the creditor objects on some other ground, then the tender is good though not in legal tender. But if the creditor keeps silent the tender is not good unless in "legal tender," notwithstanding the lack of specific objection. Legal tender is tender in any medium which the law states must be accepted in payment of debts.

There is no tender unless there is an actual handing out of the amount so that the creditor can take it if he desires, accompanied by a statement of the amount, but the money need not be counted unless that is called for. The actual amount must be tendered. There is no legal tender where there is a larger amount tendered with a request for change. But if the change is waived, the tender is good as the greater includes the lesser.

Sec. 118. RIGHTS OF PARTIES IN REGARD TO OVERPAYMENT OR UNDERPAYMENT THROUGH MISTAKE. If through a mutual mistake of the facts a wrong amount is paid, the party against whom the mistake operates may recover it by suit.

Where through miscalculation or in some other way there is a mutual mistake concerning the facts and an over payment or an under payment thus made, the party thus prejudiced may recover the amount he has lost through the mistake.

Sec. 119. INTEREST UPON THE DEBT. USURY. The debt bears the rate of interest agreed upon, provided the

rate is not usurious. If no rate is stated, debts of certain kinds bear a rate established by the law, but all debts do not bear interest. The law sets a limit in the rate of interest that can be charged. Charging more than that amount is usury, and subjects the creditor to a penalty.

It is deemed good public policy to prevent a creditor from charging more than a certain amount for the use of money. Therefore the laws of nearly all the states provide a maximum amount that may be charged. When more than the maximum rate is agreed upon the transaction is said to be usurious. The penalty for charging usury differs according to the state laws. A table in the Appendix shows the rate which can be charged and the penalty for charging a greater rate. In some states the entire interest is forfeited; in some there is a subtraction from the principal, but only a very few states deprive the lender of his principal. In very few states is usury a criminal wrong and in many, if usury is paid it cannot be recovered by the debtor. In such states the debtor must refuse to pay the usury and being sued, plead his defense. Charging the highest rate and subtracting if from the principal in advance is not usury though mathematically it may amount to a fraction more than the legal contract rate.

Where there is no agreement for interest all debts do not bear interest. The law provides for a rate where none is specifically agreed upon, but this does not apply to all forms of indebtedness. Usually it merely applies to money borrowed, debts vexatiously

withheld, etc. To mere overdue accounts, etc., it does not always apply.

Sec. 120. THE DEBT BARRED BY LAPSE OF TIME —STATUTES OF LIMITATION. Mere lapse of time will bar a debt. The statutes of the various states provide periods within which suit must be brought. But this bar may be waived by the debtor; as where he does not plead it, or makes new promises to pay, or keeps the debt alive by payments of principal or interest.

After a debt has existed for a long period of time, it will be presumed to have been paid and the states have passed statutes naming certain periods in which suit must be brought. These statutes are called "statutes of limitation." It is deemed wise not to encourage the enforcement of stale claims in which the evidence may have been lost or have become hard to find. The periods provided differ in different states and as to different classes of claims. A note, for instance, will not be barred as soon as an oral indebtedness. This bar provided by the statute is for the benefit of the debtor; he may waive its provisions either by not relying upon it when suit is brought, or by making new promises to pay the debt. If after the period has partially, or wholly run he makes a new promise to pay, the period will begin again from the date of the new promise. In many states this promise must be in writing. Also where payments are made, the payments arrest the running of the statutes. These payments may be either of principal or interest. Thus a note of very ancient date would be perfectly valid if the interest had been kept up upon it, or any interest paid within the period fixed by the law.

C. Settlement and Compromise Between Debtor and Creditor.

Sec. 121. CLAIMS — LIQUIDATED OR UNLIQUIDATED AND DOUBTFUL. In discussing this subject, it is necessary to regard the condition of the claim in respect to whether it is liquidated, unliquidated or doubtful.

We have already considered claims in respect to their condition whether they are liquidated or unliquidated. In this chapter we will have to keep that distinction in mind.

Sec. 122. SETTLEMENT OF LIQUIDATED CLAIMS. If a debt is liquidated in amount, it is settled by the rules of the common law that a payment of a smaller amount than the amount due cannot discharge the debt unless there be some new consideration.

Consideration is essential to every simple contract. It consists in parting with or promising to part with something to which one is legally entitled. One does nothing which he ought not already to do when he pays his debt. On this reasoning the common law laid down a rule that the payment of the part of a debt admitted to be true could not possibly discharge the entire debt even though that was the agreement. Thus A owes B $100, he pays $50 on B's agreement that he will discharge him for the entire debt. B can still sue for the other fifty notwithstanding his promise because A parted with nothing to which he was entitled in return for B's promise.

If however, there was any new element which could be construed into a consideration, the agreement would stand, as where the debtor paid the debt before it was due, or gave additional security. So if instead

of money he gave something whose value is not fixed but depends on the agreement of the parties, the agreement will stand. As where A owes B $100 and a typewriter worth about $50 is taken in satisfaction. This agreement will stand, because the Courts allow parties to set their own values and do not consider the adequacy of the consideration.

This rule has been departed from in some states and a payment of a smaller amount will discharge the greater provided that is the agreement.

What we have said, applies only to cases in which the amount claimed on one side is conceded to be due on the other.

Sec. 123. COMPROMISE OF UNLIQUIDATED CLAIMS—ACCORD AND SATISFACTION. If the amount of a claim is disputed in good faith, any settlement of it will stand. But if the compromise is not carried out as agreed upon, a suit may be brought on the original demand.

If any compromise of an unliquidated demand is made, the compromise will stand as made. Thus A claims B owes him $100. B in good faith claims the amount is only $75. They finally agree on $80. If B pays this there is "accord and satisfaction." A cannot claim the other twenty for by agreement $80 was agreed in settlement. If B does not pay as agreed, A can sue him on the compromise, or ignoring the compromise he can sue for the original demand.[241]

241. Snow v. Greisheimer, 220 Ill. 106. If a check is sent in "full satisfaction" and retained by the recipient, whether it will so operate depends on the question whether the debt was liquidated or unliquidated.

Sec. 124. COMPROMISE OF CLAIMS WHOSE ENTIRE VALIDITY IS DOUBTFUL. **If the validity of a claim is in doubt but the claim is made in good faith, a compromise of it is good and suit may be brought upon the compromise.**

Suppose that A has had an accident befall him which he alleges arose out of B's negligence. B denies any liability yet he agrees with A to pay him $200. A can sue on this agreement.

D. Compositions with Creditors.

Sec. 125. COMPOSITION DEFINED. **A composition by a debtor with his creditors is an arrangement whereby the debtor pays or agrees to pay a certain percentage of the claims to the creditors upon their agreement with him and with each other to accept such amount in satisfaction of the entire debt. Such an arrangement will stand as made.**

A debtor in failing circumstances often finds it advisable and possible to come through his financial difficulty by an agreement with his creditors whereby they agree with him and each other that they will accept a certain percentage in satisfaction. This may be upon a cash basis, or part cash and part time, or all upon time payments. This transaction is everywhere upheld and the old debt is wiped out in the new agreement. This is true whether the indebtedness is liquidated or unliquidated.

A composition may be a strictly cash transaction or, as is perhaps more usual, on time at least in part. It may be made with all the creditors or with only a part of them. If the debtor makes fraudulent misrepresentations the creditors are not bound upon the composition. Of course, a composition of creditors, as

the definition shows, must be upon full consent of every one involved. No creditor could be made a party to a composition which he did not agree to.

A composition by a debtor with his creditors differs from a compromise or settlement by a debtor with one of his creditors or with all of them in separate agreements. In a composition the debtor and at least two of his creditors are involved and they are all parties to the same agreement. One creditor foregoes a portion of his claim in consideration of the other creditor foregoing a portion of his. The transaction is everywhere upheld, and is frequently met with in commercial life.

In *bankruptcy*, a bankrupt debtor may offer terms of composition, as discussed in our treatment of bankruptcy.

E. Exemptions.

Sec. 126. GENERAL STATEMENT. By the various state laws, certain property is exempt from seizure for debt. These laws differ in the various states. They are based upon the theory that it is a sound public policy to prevent the debtor from being absolutely stripped of all his possessions and therefore becoming a charge upon the state. The National Bankruptcy Act gives a debtor the exemptions he is allowed by the law of his state.

The law deems it advisable to assure to a person a certain amount of property which cannot be taken from him by his creditors. This protects the debtor from being utterly deprived of his property and therefore tends to prevent him and his family from becoming paupers[242] and also enables him the better to get a

242. Wright v. Platt, 31 Wis. 99; Hughes v. Hodges, 102 N. C. 236.

new start, and is supposed to beget within him a spirit of independence making him a better citizen.

The exemption laws of the different states vary quite widely. In all the states, a homestead is allowed, but the value or amount thereof differs. Thus in Texas a homestead of 200 acres is allowed to a farmer regardless of its value, or the value of buildings on it, while in Illinois a homestead of the value of $1000 is allowed, regardless of its physical extent. The exemption laws of some states are reasonable but in others they seem to go beyond the point of a reasonable protection to debtors. While it is a salutary provision to protect debtors and their families from complete divestment, it is nevertheless also true that creditors should be paid. A law which allows a debtor to enjoy wealth in complete immunity from creditors is unjust.

Exemptions may usually be divided into three well known classes:

(1) *Exemptions in Personal Property.* The exemptions in personal property differ very widely in the different states.

(2) *Homestead.* A homestead is allowed to debtors who are householders or heads of families.

(3) *Exemption in Salary or Wages.* This varies in different states.

Besides these exemptions there may be others provided, as, for instance, insurance policies to a certain extent. We will consider these exemptions in detail.

(A) Certain Exemptions Considered.

(a) *Homestead.*

Sec. 127. HOMESTEAD DEFINED. A homestead is an estate in real property made exempt from seizure for debts

that the debtor may use the same for residence purpose. It usually exists only in favor of one who is a head of a family and who is actually occupying the estate for home purposes.

The term homestead may be used in a broad sense to signify that place upon which the home is situated including the land around it, the various outbuildings used in connection with it, etc. In the law of exemptions it has much this same meaning except that the law usually confines the homestead to a certain value or physical extent, and grants it only upon certain conditions, that is, for instance, that the homesteader shall be the head of a family and that he and his family shall be actually residing upon the homestead. Some homestead laws are more liberal than others and do not require so much. We will consider a few particulars in the law.[243]

Sec. 128. TEXT OF ILLINOIS HOMESTEAD LAW AS ILLUSTRATION.

It is impossible to set forth all of the state laws on homestead, though we may note how they differ upon some points. The Illinois Homestead Exemption Law reads in part as follows:

"Sec. 1. That every householder having a family, shall be entitled to an estate of homestead, to the extent in value of $1000, in the farm or lot of land, and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution sale for the payment of his debts, or

243. Barney v. Leeds, 51 N. H. 293 (history of homestead law).

other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided."

"(*To Continue After Death of Householder.*) Sec. 2. Such exemption shall continue after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest becomes twenty-one years of age; and in case the husband or wife shall desert his or her family, the exemption shall continue in favor of the one occupying the premises as a resident."

"(*Proceeds Exempt.*) Sec. 6. When a homestead is conveyed by the owner thereof, such conveyance shall not subject the premises to any lien or incumbrance to which it would not have been subject in the hands of such owner; and the proceeds thereof, to the extent of the amount of $1000, shall be exempt from execution or other process, for one year after the receipt thereof, by the person entitled to the exemption, and if reinvested in a homestead the same shall be entitled to the same exemption as the original homestead.

"Sec. 7. Whenever a building, exempted as a homestead, is insured in favor of the person entitled to the exemption, and a loss occurs, entitling such person to the insurance, such insurance money shall be exempt to the same extent as the building would have been had it not been destroyed."

Sec. 129. HOMESTEADER AS HEAD OF FAMILY. It is usually required that a debtor who claims a homestead be the head of a family.

The laws differ to some extent in this respect. It is commonly provided, however, that the homesteader must be the head of a family and residing with the

same. A "head of a family" is usually a married man. But under this description it has been held that any one who is maintaining a household in which there are relatives dependent upon him to some extent for support, or who constitute a family, may be entitled to a homestead. A widower living at home with his children; a young man supporting his unmarried sisters in a home maintained by them; a man supporting his mother in his home, have been held to be entitled to the exemption of homestead as "heads of families." An unmarried man maintaining a retinue of servants would not be a homesteader.

Sec. 130. HOW HOMESTEAD WAIVED. Those entitled to a homestead may usually waive it by complying with the law which sets forth how it shall be waived.

We shall find in studying the law of exemptions in personal property that the exemptions may be lost by failure to claim them; but in the law of homestead, the homestead is not lost or waived except by actual waiver in the manner prescribed by law. In some states, the constitution provides that a homestead may not be waived, though of course everywhere it may be sold. Usually however, it may be waived. Thus in Illinois it is waived by a statement in the deed to that effect, together with an acknowledgment of the waiver before a notary public or other officer. The owner of the land and also the spouse would have to join in such waiver.

(b) *Exemptions in personal property.*

Sec. 131. WHAT PERSONAL PROPERTY IS EXEMPT. The various state laws define that certain kinds of

personal property to a certain amount shall be exempt from seizure for debt.

It is the policy of the law to prevent creditors from seizing all of the debtor's personal property. The law, therefore, provides that certain of a debtor's property shall be exempt from seizure for debt. What one is entitled to may depend on whether he is the head of a family. Thus in Illinois a debtor has $100 worth of exempt personal property (besides his wearing apparel, etc.) while one who is head of a family has $400 in exempt personal property. In some states, as in Illinois, the law provides for a certain amount (as above stated) to be selected by the debtor. In other certain kinds of property are specified, as follows:

1. *Necessary wearing apparel.* A debtor is entitled to necessary wearing apparel in every state.

2. *Tools of trade.* A debtor needs his tools of trade to rebuild his fortunes and make a living. Consequently they are frequently exempted under the law. Tools of trade do not include machinery of an expensive sort.

3. *Work animals.* The debtor is often allowed a work horse or mule as exempt property.

4. *Household furniture.* Some statutes provide that the furniture used in the house for household purposes shall not be seized.

Sec. 132. WAIVER AND LOSS OF PERSONAL PROPERTY EXEMPTIONS. In some states a debtor cannot waive his exemptions by executory agreement though in others he may, and a distinction is made in some states between those exemptions which are merely for his own benefit and those for the benefit of his family. But usually a debtor when

property is seized or about to be seized must claim and assert his right to his exemptions.

We have seen that a homestead is not waived or lost unless waived in some affirmative way as provided by the statute. But in respect to personal property the law is not so strict. While it is true that some decisions deny that a debtor may waive his exemptions in his personal property by mere executory contract, as where the waiver is included in a note, yet he may unquestionably by chattel mortgage, pledge and the like forego his exceptions. So where his property is about to be seized for debt the debtor must assert his exemptions, and in some states it is provided he must do it in a particular way, as in Illinois, where he must within 10 days after the writ of execution is served upon him file a schedule with the officer, therein claiming his exemptions.

(c) *Exemptions in income.*

Sec. 133. WAGES OR SALARY EXEMPT. In almost all the states wages or salary is exempt up to a certain amount or covering a certain period.

In some states a debtor may claim so much a week in exemptions, as, for instance, $15. In others he may claim whatever he has earned within a certain period, as say, 90 days. In some states he has no exemptions in income unless he is the head of a family.

APPENDIX A.

THE FEDERAL BANKRUPTCY LAW.

APPENDIX A.

THE FEDERAL BANKRUPTCY LAW.

CHAPTER 1.

DEFINITIONS.

CHAPTER 2.

CREATION AND JURISDICTION OF COURTS OF BANKRUPTCY.

CHAPTER 3.

BANKRUPTS.

15. Discharges, when revoked.
16. Co-debtors of bankrupts.
17. Debts not affected by a discharge.

CHAPTER 4.

COURTS AND PROCEDURE THEREIN.

Secs.
18. Process, pleadings and adjudications.
19. Jury trials.
20. Oaths, affirmations.
21. Evidence.
22. References of cases after adjudications.
23. Jurisdiction of United States and State Courts.
24. Jurisdiction of Appellate Courts.
25. Appeals and writs of error.
26. Arbitration of controversies.
27. Compromises.
28. Designation of newspapers.
29. Offenses.
30. Rules, forms and orders.
31. Computation of time.
32. Transfer of cases.

CHAPTER 5.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Secs.
33. Creation of two offices.
34. Appointment, removal and districts of referees.
35. Qualifications of referees.
36. Oath of office of referees.
37. Number of referees.
38. Jurisdiction of referees.

39. Duties of referees.
40. Compensation of referees.
41. Contempts before referees.
42. Records of referees.
43. Referee's absence or disability.
44. Appointment of trustees.
45. Qualifications of trustees.
46. Death or removal of trustees.
47. Duties of trustees.
48. Compensation of trustees, receivers and marshals.
49. Accounts and papers of trustees.
50. Bonds of referees and trustees.
51. Duties of clerks.
52. Compensation of clerks and marshals.
53. Duties of attorney general.
54. Statistics of bankruptcy proceedings.

CHAPTER 6.

CREDITORS.

Secs.

55. Meetings of creditors.
56. Voters at meetings of creditors.
57. Proof and allowance of claims.
58. Notice to creditors.
59. Who may file and dismiss petitions.
60. Preferred creditors.

CHAPTER 7.

ESTATES.

Secs.

61. Depositories for money.
62. Expenses of administering estates.
63. Debts which may be proved.

An Act to establish a uniform system of bankruptcy throughout the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

CHAPTER I.

DEFINITIONS.

Section 1. Meaning of Words and Phrases.—a. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) "Adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed;

(3) "Appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) "Bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside

or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) "Clerk" shall mean the clerk of a court of bankruptcy;

(6) "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) "Court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;

(8) "Courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska;

(9) "Creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(10) "Date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

(12) "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) "Document" shall include any book, deed, or instrument in writing;

(14) "Holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving;

(15) A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred,

concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

(16) "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

(17) "Oath" shall include affirmation;

(18) "Officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and by any person authorized by law to perform the duties of such officer;

(19) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies or corporations;

(20) "Petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;

(22) "Conceal" shall include secrete, falsify, and mutilate;

(23) "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) "Transfer" shall include the sale and every other and

different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

(26) "Trustee" shall include all of the trustees of an estate;

(27) "Wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

(28) Words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) Words importing the plural number may be applied to and mean only a single person or thing;

(30) Words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Section 2. That the courts of bankruptcy as hereinbefore defined, viz.,

The district courts of the United States in the several states,

The supreme court of the District of Columbia,

The district courts of the several Territories, and

The United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof, or who do not have their prin-

cipal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

(4) Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided by section 48 of this Act;

(6) Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) Close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging

the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) Confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

(10) Consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

(11) Determine all claims of bankrupts to their exemptions;

(12) Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) Extradite bankrupts from their respective districts to other districts;

(15) Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;

(16) Punish persons for contempts committed before referees;

(17) Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

(18) Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;

(19) Transfer cases to other courts of bankruptcy; and

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

Nothing in this section contained shall be construed to deprive

a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

Section 3. ACTS OF BANKRUPTCY.—a. Acts of bankruptcy by a person shall consist of his having

(1) Conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

(2) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

(4) Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or

(5) Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving

a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c. It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by

such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Sec. 4. WHO MAY BECOME BANKRUPTS.—a. Any person except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

b. Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

Sec. 5. PARTNERS.—a. A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b. The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c. The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d. The trustees shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e. The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g. The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Sec. 6. EXEMPTIONS OF BANKRUPTS.—a. This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Sec. 7. DUTIES OF BANKRUPTS.—a. The bankrupt shall (1) Attend the first meeting of his creditors, if directed by

the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) Comply with all lawful orders of the court;

(3) Examine the correctness of all proofs of claims filed against his estate;

(4) Execute and deliver such papers as shall be ordered by the court;

(5) Execute to his trustee transfers of all his property in foreign countries;

(6) Immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) In case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) Prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known; if unknown, that fact to be stated; the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) When present at the first meeting of his creditors, and at such other time as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Sec. 8. DEATH OR INSANITY OF BANRUPTS.—a. The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided,* That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Sec. 9. PROTECTION AND DETENTION OF BANKRUPTS.—a. A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the

evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Sec. 10. EXTRADITION OF BANKRUPTS.—a. Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Sec. 11. SUITS BY AND AGAINST BANKRUPTS.—a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b. The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c. A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Ses. 12. COMPOSITIONS, WHEN CONFIRMED.—a. A bankrupt may

offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.

b. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c. A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d. The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors: (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e. Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dis-

missed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Sec. 13. COMPOSITIONS, WHEN SET ASIDE.—a. The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such compensation, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Sec. 14. DISCHARGES, WHEN GRANTED.—a. Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustees or other parties in interest, at such time as will give the trustees or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed concealed or failed to keep books of account or records from such condition might be ascertained; or (3) obtained money or property on credit from any person upon a materially false statement in writing made by him to such person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his

creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. Provided; that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

c. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Sec. 15. DISCHARGES, WHEN REVOKED.—a. The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Sec. 16. CO-DEBTORS OF BANKRUPTS.—a. The liabiliy of a person who is a co-debtor with, or guarantor or in manner surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Sec. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) Are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

(2) Are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

(3) Have not been duly scheduled in time for proof and allow-

ance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

Sec. 18. Process, Pleadings, and Adjudications.—a. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

b. The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

c. All pleadings setting up matters of fact shall be verified under oath.

d. If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in

cases where a jury trial is given by this Act, and make the adjudication or dismiss the petition.

e. If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f. If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g. Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed, at the time of the filing, the clerk shall forthwith refer the case to the referee.

Sec. 19. JURY TRIALS.—a. A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b. If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c. The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed,

except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Sec. 20. OATHS, AFFIRMATIONS.—a. Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b. Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Sec. 21. EVIDENCE.—a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: *Provided,* That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

b. The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c. Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d. Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the

records of district courts of the United States are now or may hereafter be admitted as evidence.

e. A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f. A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g. A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Sec. 22. REFERENCE OF CASES AFTER ADJUDICATION.—a. After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b. The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Sec. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as

though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.

c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Sec. 24. Jurisdiction of Appellate Courts.—a. The Supreme Court of the United States, the circuit court of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Sec. 25. Appeals and Writs of Error.—a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit,

(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) From a judgment granting or denying a discharge; and

(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b. From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

c. Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d. Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Sec. 26. ARBITRATION OF CONTROVERSIES.—a. The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and

the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Sec. 27. COMPROMISES.—a. The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Sec. 28. DESIGNATION OF NEWSPAPERS.—a. Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspapers in which notices and orders in such case shall be published.

Sec. 29. OFFENSES.—a. A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently

(1) Concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or

(2) Made a false oath or account in, or in relation to, any proceeding in bankruptcy;

(3) Presented under oath any false claim for proof against

the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

(4) Received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or

(5) Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c. A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

(1) Acted as a referee in a case in which he is directly or indirectly interested; or

(2) Purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) Refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d. A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Sec. 30. RULES, FORMS, AND ORDERS.—a. All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Sec. 31. COMPUTATION OF TIME.—a. Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday.

in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Sec. 32. Transfer of Cases.—a. In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Sec. 33. Creation of Two Offices.—a. The offices of referee and trustee are hereby created.

Sec. 34. Appointment, Removal, and Districts of Referees.—a. Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Sec. 35. Qualifications of Referees.—a. Individuals shall not be eligible to appointment as referees unless they are respectively

(1) Competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;

(3) Not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or

of the justices or judges of the appellate courts of the districts wherein they may be appointed; and

(4) Residents of, or have their offices in, the territorial districts for which they are to be appointed.

Sec. 36. OATHS OF OFFICE OF REFEREES.—a. Referees shall take the same oath of office as that prescribed for judges of United States courts.

Sec. 37. NUMBER OF REFEREES.—a. Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Sec. 38. JURISDICTION OF REFEREES.—a. Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) Consider all petitions referred to them by the clerks and make adjudications or dismiss the petitions;

(2) Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitments;

(3) Exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) Upon the application of the trustee during the examination of the bankrupt, or other proceedings, authorize the employment

of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Sec. 39. DUTIES OF REFEREES.—a. Referees shall

(1) Declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

(2) Examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

(3) Furnish such information concerning the estate in process of administration before them as may be requested by the parties in interest;

(4) Give notices to creditors as herein provided;

(5) Make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

(6) Prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so;

(7) Safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded;

(8) Transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

(9) Upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and

(10) Whenever their respective offices are in the same cities

or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Sec. 40. COMPENSATION OF REFEREES.—a. Referees shall received as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b. Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c. In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Sec. 41. CONTEMPTS BEFORE REFEREES.—a. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law;

Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Sec. 42. RECORDS OF REFEREES.—a. The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b. A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c. The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Sec. 43. REFEREE'S ABSENCE OR DISABILITY.—a. Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Sec. 44. APPOINTMENT OF TRUSTEES.—a. The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or

after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Sec. 45. QUALIFICATIONS OF TRUSTEES.—a. Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Sec. 46. DEATH OR REMOVAL OF TRUSTEES.—a. The death or removal of a trustee shall not abate any suit or proceedings which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Sec. 47. DUTIES OF TRUSTEES.—a. Trustees shall respectively

(1) Account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereof; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.

(3) Deposit all money received by them in one of the designated depositories;

(4) Disburse money only by check or draft on the depositories in which it has been deposited;

(5) Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

(6) Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) Lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

(9) Pay dividends within ten days after they are declared by the referees;

(10) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b. Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c. The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive

a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

Sec. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS.—

(a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such compensation.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

(d) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commission upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the

moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided,* That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further,* That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further,* That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two

per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided,* That in case of the confirmation of a composition such commission shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further,* That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

Sec. 49. ACCOUNTS AND PAPERS OF TRUSTEES.—a. The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Sec. 50. BONDS OF REFEREES AND TRUSTEES.—a. Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b. Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c. The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount

of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d. The court shall require evidence as to the actual value of the property of sureties.

e. There shall be at least two sureties upon each bond.

f. The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g. Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h. Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i. Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

j. Joint trustees may give joint or several bonds.

k. If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l. Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m. Suits upou trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Sec. 51. DUTIES OF CLERKS.—a. Clerks shall respectively

(1) Account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be

received for certified copies of records which may be prepared for persons other than officers;

(2) Collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompannied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) Deliver to the referee upon application all papers which may be referred to them, or if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) And within ten days after each case has been closed pay to the referee, if the case was referred, the fee collectd for him, and to the trustee the fee collected for him at the time of filing the petition.

Sec. 52. COMPENSATION OF CLERKS AND MARSHALS.—a. Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b. Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted fixing the compensation of marshals.

Sec. 53. DUTIES OF ATTORNEY-GENERAL.—a. The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid

and the expenses of administering such estates; and such other like information as he may deem important.

Sec. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a. Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Sec. 55. MEETINGS OF CREDITORS.—a. The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b. At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c. The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

d. A meeting of creditors, subsequent to the first one, may

be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e. The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f. Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Sec. 56. VOTERS AT MEETINGS OF CREDITORS.—a. Creditors shall pass upon matters submitted to them at their mettings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b. Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditor's meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Sec. 57. PROOF AND ALLOWANCE OF CLAIMS.—a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of

such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c. Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d. Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e. Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the court seem to be owing over and above the value of their securities or priorities.

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be

credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i. Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j. Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m. The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n. Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided,* That the right of infants and insane persons

without guardians, without notice of the proceedings, may continue six months longer.

Sec. 58. NOTICES TO CREDITORS. (a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.

b. Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c. All notices shall be given by the referee, unless otherwise ordered by the judge.

Sec. 59. WHO MAY FILE AND DISMISS PETITION.—a. Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c. Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d. If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answers a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e. In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f. Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g. A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice, to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to

allow all creditors and parties in interest opportunity to be heard.

Sec. 60. PREFERRED CREDITORS.—a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

c. If a creditor has been preferred, and afterwards in good

faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

Sec. 61. DEPOSITORIES FOR MONEY.—a. Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Sec. 62. EXPENSES OF ADMINISTERING ESTATES.—a. The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Sec. 63. DEBTS WHICH MAY BE PROVED.—a. Debts of the

bankrupt may be proved and allowed against his estate which are

(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

(2) Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) Founded upon an open account, or upon a contract express or implied; and

(5) Founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Sec. 64. DEBTS WHICH HAVE PRIORITY.—a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) The actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.

(3) The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant.

(5) Debts owing to any person who by the laws of the States or the United States is entitled to priority.

c. In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Sec. 65. Declaration and Payment of Dividends.—a. Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b. The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided,* That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: *And provided further,* That the final dividend shall not be declared within three months after the first dividend shall be declared.

c. The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d. Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amount.

e. A claimant shall not be entitled to collect from a bank-

rupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Sec. 66. UNCLAIMED DIVIDENDS.—a. Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided,* That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Sec. 67. LIENS.—a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if

(1) It appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or

(2) The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or

(3) That such lien was sought and permitted in fraud of the provisions of this Act;

Or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.

e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesiad shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such

debtor by the laws of the State, Territory, or District in which such property is situated, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided,* That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Sec. 68. SET-OFFS AND COUNTERCLAIMS.—a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt be set off against the other, and the balance only shall be allowed or paid.

b. A set-off or counterclaim shall not be allowed in favor of

any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Sec. 69. POSSESSION OF PROPERTY.—a. A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that is has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Sec. 70. TITLE TO PROPERTY.—a. The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

(1) Documents relating to his property;

(2) Interests in patents, patent rights, copyrights, and trademarks;

(3) Powers which might have exercised for his own benefit,

but not those which he might have exercised from some other person;

(4) Property transferred by him in fraud of his creditors;

(5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:

Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

(6) Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b. All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c. The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d. Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e. The trustee may avoid any transfer by the bankrupt of his

property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f. Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

[71] a. This Act shall go into full force and effect upon its passage:

Provided, however, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b. Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

Sec. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: *Provided,* That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

Sec. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act.

APPENDIX B.

INTEREST TABLE.

APPENDIX B.

INTEREST TABLE.

(Note: This table is necessarily too brief for anything except general reference. Accuracy is attempted but not guaranteed; and details and distinctions between large and small loans, etc., are omitted.)

State	Rate interest which debt bears where no rate agreed upon	Maximum rate of interest which may be contracted for (more than which is usury)	Penalty for charging usury
Alabama	8	8%	Forfeiture of all interest
Alaska	8	12%	Forfeiture interest
Arizona	6	10%	Forfeit double excess interest
Arkansas	6	10%	Forfeiture of debt
California	7	12%	None
Colorado	8	24%	None
Connecticut	6	12%	Forfeiture of debt and interest
Delaware	6	6%	None
D. of C.	6	10%	Forfeiture of all interest
Florida	8	10%	Forfeiture of all interest
Georgia	7	8%	Forfeiture of excess interest
Idaho	7	10%	Forfeiture of all interest
Illinois	5	7%	Forfeiture of all interest
Indiana	6	8%	Forfeiture of all interest over 8%
Iowa	6	8%	Forfeiture of all interest and costs of suit
Kansas	6	10%	Forfeiture of double the usury
Kentucky	6	6%	Forfeiture of excess interest
Louisiana	5	8%	Forfeiture of interest over 8%
Maine	6	No limit	None

State	Rate interest which debt bears where no rate agreed upon	Maximum rate of interest which may be contracted for (more than which is usury)	Penalty for charging usury
Maryland	6	6%	Forfeiture of interest
Massachusetts	6	No limit	On less than $1000 only 18% recoverable
Michigan	5	7%	Forfeiture of all interest
Minnesota	6	10%	Forfeiture of debt and interest
Mississippi	6	8%	Forfeiture of all interest
Missouri	6	8%	Forfeiture of excess interest
Montana	8	10%	Forfeiture double interest
Nebraska	7	10%	Forfeiture of all interest
Nevada	7	12%	
New Hampshire	6	6%	Forfeiture 3 times excess interest
New Jersey	6	6%	Forfeiture of all interest
New Mexico	6	12%	Forfeiture double the usury
New York	6	6%	Forfeiture of debt and interest
North Carolina	6	6%	Forfeiture of all interest
North Dakota	6	10%	Forfeiture of all interest
Ohio	6	8%	Forfeiture of excess over six
Oklahoma	6	10%	Forfeiture of twice interest
Oregon	6	10%	Forfeiture of debt and interest
Pennsylvania	6	6%	Forfeiture of excess interest
Rhode Island	6	30%	
South Carolina	7	8%	Forfeiture of all interest
South Dakota	7	12%	Forfeiture of all interest
Tennessee	6	6%	Forfeiture of excess interest
Texas	6	10%	Forfeiture of all interest
Utah	8	12%	Forfeiture of debt and interest
Vermont	6	6%	Forfeiture of excess interest

State	Rate interest which debt bears where no rate agreed upon	Maximum rate of interest which may be contracted for (more than which is usury)	Penalty for charging usury
Virginia...........	6	6%	Forfeiture of all interest
Washington........	6	12%	Forfeiture of all interest
West Virginia......	6	6%	Forfeiture of excess interest
Wisconsin..........	6	10%	Forfeiture of all interest
Wyoming..........	8	12%	Forfeiture of all interest

APPENDIX C.

TABLE OF EXEMPTION LAWS.

APPENDIX C.

TABLE OF EXEMPTION LAWS.[1]

(Property or income exempt from seizure for debt.)

State	Homestead Exempt	Personal Property Exempt	Wages Exempt
Alabama	$2000	$1000	$25 mo.
Arizona	4000	*	½ 30 d's. wg.
Arkansas	2500	500	60 d's. wg.
California	5000		30 d's. wg.
Colorado	2000	*	60%
Connecticut	1000	*	$50
Delaware		200	50%
District of Columbia		300	
Florida	160 acres[2]	1000	All.
Georgia	1600	*	
Idaho	5000	*	
Illinois	1000	400	$15 per wk.
Indiana	600	600	
Iowa	40 acres[2]	*	All; 3 mo.
Kansas	160 acres[2]	*	All; 3 mo.
Kentucky	1000		
Louisiana	2000		
Maine	500		
Maryland		100	$100
Massachusetts	800	*	
Michigan	1500	*	
Minnesota	80 acres[2]	*	$25 last 30 ds.
Mississippi	3000	*	$50 per mo.
Missouri	1500	*	All; 30 ds.
Montana	2500		
Nebraska	2000	500	90%
Nevada	5000	*	
New Hampshire	500	*	$20

[1]Accuracy, on account of brevity, is not possible in a table of this sort. General accuracy has been attempted, but is not for the reason stated guaranteed.
[2]Farm land; smaller amount in towns.
*Specific articles exempt without regard to value.

State	Home-stead Exempt	Personal Property Exempt	Wages Exempt
New Jersey................	1000	200	
New Mexico..............	1000	*	
New York................	1000	250	60 ds.
North Carolina............	1000	500	
North Dakota.............	5000	*	
Ohio.....................	1000	500	All; 3 mo.
Oklahoma.................	5000	*	75%; 90 ds.
Oregon...................	3000	*	$75
Pennsylvania..............		300	
Rhode Island..............		*	$10 per wk.
South Carolina............	1000	500	
South Dakota.............	5000	750	
Tennessee................	1000	*	$30
Texas....................	5000	*	All.
Utah.....................	2000	*	$30
Vermont..................	500	200	
Virginia..................	2000	*	$50 per mo.
Washington...............	2000	1500	All; 60 ds.
West Virginia.............	1000	200	
Wisconsin................	5000	*	
Wyoming.................	2500	*	½60 ds. wg.

*See footnote page 255.

APPENDIX D.

QUESTIONS AND PROBLEMS.

APPENDIX D.

QUESTIONS AND PROBLEMS

CHAPTER ONE.

1. Define the term bankruptcy.

2. Whence is the term derived?

3. Distinguish bankruptcy from insolvency.

4. What was the earliest bankruptcy law? What was object of early bankruptcy laws?

5. What is the power of our Federal Government to pass bankruptcy laws?

6. Has the present act been attacked as unconstitutional? On what grounds?

7. How many laws have been enacted by the Federal Government on the subject of bankruptcy? What is the date of the present act?

8. What are the two main purposes of the present act?

9. State the steps ordinarily taken during a bankruptcy proceeding.

CHAPTER TWO.

10. What courts are given jurisdiction under present bankrupty law?

11. How is United States divided for purpose of territorial jurisdiction of bankruptcy courts?

12. What must be shown of a debtor to authorize a proceeding against him in any particular court of bankruptcy with reference to its particular jurisdiction over him?

13. May a corporation have a principal place of business outside of the state incorporating it?

14. If several petitions are filed in different jurisdiction against same debtor, what course will be taken?

15. What is meant by ancillary jurisdiction?

16. What suits to recover property can trustee bring in federal courts? What in state courts?

17. What is a summary proceeding to recover assets? When is it not allowable?

18. What is the jurisdiction of a referee?

CHAPTER THREE.

19. A petition in bankruptcy was filed against an insurance company. It consented to the jurisdiction. Will this confer jurisdiction?

20. Who is a "wage earner" within the meaning of the law? Can he file a voluntary petition in bankruptcy?

21. A was a teamster hauling for various persons who would employ him from time to time using his own outfit. He made $1400 a year. Can he be proceeded against in bankruptcy?

22. Can a farmer file a voluntary petition in bankruptcy?

23. A owned and worked a farm. He also conducted a country store. He also bought and sold hogs, keeping them upon his farm and feeding them with the products thereof. Is he a farmer within the meaning of the law? Indicate what would determine.

24. What is the period in which one's occupation is considered in order to determine whether the bankruptcy court has jurisdiction? Suppose one is not in an exempt occupation at the time the alleged act of bankruptcy was committed, but now defends that he was in an exempt occupation when the petition was filed. What will govern?

25. What corporations may become voluntary bankrupts?

26. Is an incorporated society or club, not for profit, entitled to file a petition in bankruptcy? Can it be made an involuntary bankrupt?

27. A railroad company becomes insolvent. May it be made a voluntary or involuntary bankrupt?

28. Same question concerning a street car company? An electric light company?

29. A city becomes insolvent. Is it subject to bankruptcy proceedings?

30. Has the bankruptcy court jurisdiction of banks?

31. Is an unincorporated lodge subject to bankruptcy jurisdiction?

32. May a partnership be adjudicated a bankrupt? Is it an entity under the bankruptcy law?

33. Is a person under age subject to bankruptcy proceedings? An insane person? Estates of decedents? Aliens?

34. How much must a person owe to be adjudicated bankrupt?

CHAPTER FOUR.

35. What is meant by the phrase "an act of bankruptcy"?

36. Define insolvency.

37. A has a business which as a going concern is worth $20,000.

A's debts are $21,000. He is entitled to a homestead of $1,000, and is living in a house whose "equity" is worth that sum. Is A insolvent?

38. What is the rule about determining assets as their fair value?

39. A is worth $20,000. He owes $10,000. He transfers $15,000 to B with the understanding B is to retransfer it to him after he gets out of financial difficulty. Is A insolvent under the meaning of the present act?

40. What was the test of insolvency under former acts of bankruptcy?

41. Is a bankrupt entitled to jury trial on the question of insolvency?

42. If an involuntary petition is filed alleging (as it must) an act of bankruptcy, within what time must it allege that the act of bankruptcy was committed?

43. Suppose a petition does not allege an act of bankruptcy? May it be amended? Suppose the amendment shows an act of bankruptcy within the required time previous to the filing of the original petition, but not within that time from the filing of the amendment. Is the amendment sufficient?

44. What is the first act of bankruptcy?

45. Is insolvency an element in this act?

46. What is the next act of bankruptcy? Is it necessary that it be avoidable in order to constitute an act of bankruptcy?

47. Can there be a preference in fact by an insolvent debtor that does not amount to a preference that constitutes an act of bankruptcy?

48. A, while insolvent, borrows money from B and gives him a mortgage on his property. Is this a preference?

49. A, while insolvent, has a judgment entered against him. Is this in itself an act of bankruptcy?

50. A makes an assignment of his property to B as trustee to enable B to divide the same among his creditors in proportion to their claims. Can any of these creditors take the estate into bankruptcy?

51. Is an application for a receivership in a state court always an act of bankruptcy? What part does insolvency play in this act of bankruptcy?

52. What is the last of the acts of bankruptcy as enumerated?

CHAPTER FIVE.

53. What schedules are attached to a voluntary petition in bankruptcy?

54. How many creditors are required to file an involuntary petition?

55. Can a creditor who has been preferred by a bankrupt be a petitioning creditor? Can a secured creditor be counted?

56. What must the petition allege?

57. What is "adjudication" in bankruptcy?

58. When is the first meeting of creditors held? Its purpose? Business done thereat?

59. How, when and by whom is the trustee elected?

60. State in a general way the duty of a trustee with respect to administration of estate.

CHAPTER SIX.

61. A files a petition in bankruptcy on Aug. 15. Thereafter and prior to the time he is adjudicated a bankrupt, his father dies leaving him a large legacy. Is the trustee when elected entitled to this fund for the benefit of the creditors?

62. A's father dies leaving him certain real estate subject to a life interest in the property of A's sister. A thereafter files a petition in bankruptcy. Does this real estate pass to the trustee?

63. A sells property on installments of $100 a month. While $5,000 is still owing A, to be paid in the following 50 months, A goes into bankruptcy. Does the trustee get title to A's interest in the payments?

64. Who has title to a bankrupt's property between the date of filing the petition and the election of the trustee?

65. Suppose all creditors of A are general creditors. A borrows money from B and gives as security a chattel mortgage on certain of A's property. Under the local law, B's rights in this chattel mortgage are superior to those of other general creditors provided B takes possession or records the mortgage prior to any lien being obtained by the other creditors. B, however, does neither. In this state of affairs A goes in bankruptcy. B contends that he has a valid lien even though he did not record or take possession, as the trustee represents only general creditors. How should the court decide?

66. A has a membership in a stock exchange not transferable except with consent of a majority of the other members. It is worth

$5,000 if a transfer is made. A goes into bankruptcy. Does this membership pass to the trustee?

67. Do patents pass to trustee? Coyprights? Trademarks?

68. A goes into bankruptcy. He has an insurance policy on his life the cash value of which is $5,000. A's wife is beneficiary under the policy. Does it pass to the trustee? How can a debtor prevent a trustee from getting title to insurance policies?

69. A holds property in trust and goes into bankruptcy. Does the trustee in bankruptcy get title to the trust property?

70. A collects a fund for B and then goes into bankruptcy. The fund was paid by A into his general bank account, which was never lower than B's fund. Can B claim the entire fund?

71. A stock broker buys stock in M Co. on B's account and with B's funds. B orders them resold by the broker when prices reaching a certain point. Before selling for B, A goes into bankruptcy. Certificates of stock in the M Co. are in his possession but not the identical ones bought for B. If there are no other claimants for these particular certificates, can B reclaim them, or are they assets of the estate?

72. In case an insolvent person prefers one creditor over another, can the trustee set aside such preference? Provided what?

73. A borrows money from B. Afterwards desiring to borrow more, A requires a mortgage to cover the entire indebtedness. This second loan and the mortgage are made within the four months immediately preceding the time A's creditors file a petition in bankruptcy. Under what circumstances will the entire security stand? Under what will part be divided and which part?

74. Is the setting aside of fraudulent conveyances by the trustee confined to those conveyances made within four months prior to the proceedings in bankruptcy?

75. If the bankrupt has in his possession property belonging to another when the petition is filed, are the real owners entitled to claim the same or does it become a part of the estate?

76. A manufacturer of automobiles appoints B his agent to sell same and sends B a quantity of cars. B goes into bankruptcy. Can A reclaim the cars or is he a general creditor?

77. If the bankrupt has property which has been sold to him under conditional sale, that is, with reservation of title in the vendor until the purchaser pays the entire purchase price, can such conditional vendor reclaim the property from the trustee?

78. What is the rule as to rights of holder of mortgage on debtor's personal property when debtor goes into bankruptcy?

79. Can the trustee claim title to property of the bankrupt in possession of another?

80. B was driving a truck containing goods for use in his business. M negligently drove his truck against B's truck and damaged B's truck, ruined the contents and injured B. B shortly afterwards goes into bankruptcy. Has B's trustee a right to enforce B's claims against M for benefit of creditors?

81. Suppose B, a debtor, owns property which is of no value to the trustee. Does he take title thereto?

82. A obtains a judgment against B. Under the statute of the state, a judgment creditor has a lien upon his debtor's property. This lien gives A an advantage over C, D, E, and F, general creditors of B. B commits an act of bankruptcy within four months after this judgment and still within said four months a petition is filed against him. Is the title of the trustee to B's property subject to this lien?

83. In the above case suppose the judgment lien is more than four months old. Is the trustee's title subject thereto?

84. B, who is insolvent, borrows money and gives a chattel mortgage on his automobile to secure the loan. This chattel mortgage is duly recorded as required by law. The lender knows when he makes the loan that B is insolvent. Will his lien stand against the title of the trustee in bankruptcy?

85. Is a "mechanic's lien" acquired at any time dissolved by bankruptcy proceedings? Why?

CHAPTER SEVEN.

86. Is a claim not due when the petition is filed provable in bankruptcy?

87. After B files a petition in bankruptcy, and while the proceedings are in progress he borrows from A. Is A's claim provable in the case?

88. Is a judgment against a debtor provable in the event of his bankruptcy?

89. B having a lease from A with monthly rental payments goes into bankruptcy. Can B prove the subsequently accruing installments?

90. A and B enter into a contract whereby B agrees to sell goods to A. B fails to perform and A claims damages. B disputes A's claim and argues that even if A has a claim, it is not as great as A has estimated. B goes into bankruptcy. Has A got a provable claim? Has the bankruptcy court power to determine the validity and amount of B's claim.

91. B negligently operates his automobile whereby he injures A.

B then goes into bankruptcy. Has A a provable claim against B's estate?

92. How are claims proved in bankruptcy?

93. What is meant by allowance of claims?

94. Can a secured creditor prove his claim? Does he lose his claim by not proving it?

95. What is meant by saying a claim has "priority"?

96. What are the first class of claims having priority?

97. What is the next class?

98. The third class?

99. Suppose there is only enough in the estate to pay costs of administration. Would such costs come ahead of taxes?

100. B goes into bankruptcy owing $5,000 as wages to his employees. There is enough in his estate to pay all costs of administration, etc., and enough to pay his help, but nothing will then be left for general creditors. Do the employees take all the estate? Under what conditions. (If the general creditors got nothing at all would these debts be discharged?)

101. What is the next class of priorities?

102. Who is a preferred creditor? How does he differ from a priority creditor? If a preferred creditor is compelled to give up his preference can he prove his claim? If he can not be made to give up his preference, can he prove up on the balance of his claims?

103. When should dividends be paid on a bankrupt estate?

104. What is a composition in bankruptcy? Its purpose? Conditions of its offer? Of its acceptance?

105. B goes into bankruptcy owing A $1,000. A owes B $1,000. Can A keep the $1,000?

CHAPTER EIGHT.

106. State in a summary way chief duties of bankrupt in respect to the administration of his estate.

107. What is bankrupt's duty to submit to examinations?

108. Has he a right to refuse to answer any question? What result may follow his refusal?

109. What are the offenses created by the bankruptcy act?

110. To what exemptions is the bankrupt entitled?

111. What must he do to get his exemptions?

112. What right has a debtor to convert his non-exempt into exempt property?

CHAPTER NINE.

113. What is the importance of obtaining a discharge in bankruptcy?

114. Within what time must bankrupt apply for his discharge?

115. How is application for discharge made?

116. How are objections to discharge made?

117. B, a debtor, keeps no books of account. He is thrown into bankruptcy. Will his failure to keep books prevent him from getting a discharge? Explain fully.

118. B, desiring to purchase goods from A, is requested by A to furnish a statement of his assets and liabilities. B does so and the same is false. B goes into bankruptcy. Can C oppose discharge on the basis of the statement made by B to A?

119. Enumerate the other grounds of discharge.

120. What is the general rule as to debts that are dischargeable?

121. If a debt is not provable, does bankruptcy affect it?

122. B goes through bankruptcy. His estate has no assets. Are B's taxes discharged by the proceedings?

123. B obtains property from A on credit by representing he is solvent when in fact he knows he is insolvent. Is B's debt to A discharged by B's discharge in bankruptcy?

124. B so carelessly drives his car that he runs over and seriously injures A. A gets a judgment against B. B then files his petition in bankruptcy and gets his discharge. B proved his claim and got 15 per cent in dividends. Is A's judgment discharged by B's discharge?

125. B assaulted A. A gets a judgment and B goes through bankruptcy. Is A's claim barred by B's discharge?

126. B collects money for A and misappropriates it. Is B's liability to A discharged by his subsequent discharge in bankruptcy?

127. Is alimony dischargeable?

128. B goes into bankruptcy and forgets to schedule A as his creditor. Under what circumstances would A's debt be not discharged?

129. B was discharged in bankruptcy. He wrote a letter to A after his discharge saying "You will be paid in full." Can A hold B on the claim?

CHAPTER TEN.

130. Define indebtedness; mature indebtedness; immature indebtedness; secured; unsecured; general indebtedness.

131. Define a lien. What various kinds?

132. What are the usual provisions of a chattel mortgage?

133. How does a chattel mortgagee protect his lien?

134. What is a conditional sale and how are rights of the vendor protected?

135. What is a pledge? What property may be pledged?

136. What are the "common law liens"? What is meant by saying they are possessory liens?

137. What is a mechanic's lien?

138. What are judicial liens?

CHAPTER ELEVEN.

139. What is a fraudulent conveyance? What two kinds? May future creditors object?

140. What are badges of fraud? Enumerate.

INDEX.

INDEX.

(References are to sections.)

A.

(References are to sections.)

B.

C.

(References are to sections.)

(References are to sections.)

D.

E.

F.

H.

(References are to sections.)

I.

J.

(References are to sections.)

L.

M.

O.

P.

(References are to sections.)

(References are to sections.)

T.

U.

V.

W.

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